TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. 35

UNITED STATES OF AMERICA, APPELLANT,

vs.

GERALD H. SHARPNACK

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

FILED NOVEMBER 8, 1956
PROBABLE JURISDICTION NOTED JANUARY 14, 1957

Supreme Court of the United States

OCTOBER TERM, 1956

No. 559

UNITED STATES OF AMERICA, APPELLANT,

vs.

GERALD H. SHARPNACK

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

INDEX

[fol. 1] Caption—(Omitted in printing)

[fol. 2] **IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS**

Criminal Docket 21104

The United States

vs.

Gerald H. Sharpnack

18 U.S.C. 13 and Art. 535(b) and Art. 535(c)
Texas Penal Code

Docket Entries

1956

January 4. Presentment, filed and entered.
January 4. Indictment, filed.
January 6. Motion to Dismiss, filed.
January 6. Motion to Dismiss heard and taken under advisement.
January 6. Plea: Not guilty to 1st, 2nd & 3rd cts.
August 14. Order Dismissing Indictment, filed and entered. (copy of above Order mailed to atty. for deft.)
September 10. Notice of Appeal to the Supreme Court of the United States filed.
September 14. Stipulation on Defendant's Motion to Dismiss, filed.

[fol. 3] In United States District Court
for the Western District of Texas
San Antonio Division

Criminal No. 21104

United States of America

v.

Gerald H. Sharpnack

(18 USC 13 and Art. 535(b) and Art. 535(c),
Texas Penal Code)

Indictment—Filed January 4, 1956

The grand jury charges:

That on or about April 3, 1955, at Randolph Air Force Base, a military reservation within the special territorial jurisdiction of the United States, in Bexar County, Texas, within the San Antonio Division of the Western District of Texas, GERALD H. SHARPNACK did, then and there unlawfully and with lascivious intent, knowingly and intentionally, expose his private parts to Steven R. Sturm, the said Steven R. Sturm being then and there a male person under the age of sixteen years, in violation of Section 535(c) of the Penal Code of the State of Texas.

Second Count

That on or about April 3, 1955, at Randolph Air Force Base, a military reservation within the special territorial jurisdiction of the United States, in Bexar County, Texas, within the San Antonio Division of the Western District of Texas, GERALD H. SHARPNACK did, then and there, unlawfully and with lascivious intent, entice, allure, and persuade Steven R. Sturm, a male child under the age of fourteen years, to enter a room, to wit: Room No. 28, Bachelor Officers' Quarters "B", located at the aforesaid Randolph Air Force Base, for the purpose of proposing that the said Steven R. Sturm feel the sexual parts of him; the said GERALD H. SHARPNACK, in violation of Section 535(b) of the Penal Code of the State of Texas.

Third Count

That on or about April 3, 1955, at Randolph Air Force Base, a military reservation within the special territorial jurisdiction of the United States, in Bexar County, Texas, within the San Antonio Division of the Western District of Texas, GERALD H. SHARPNACK did, then and there, unlawfully and with lascivious intent, knowingly and intentionally, expose his private parts to Larry D. Pogreba, the said Larry D. Pogreba being then and there a male person under the age of sixteen years, in violation of Section 535(c) of the Penal Code of the State of Texas.

[fol. 4] *Fourth Count*

That on or about April 3, 1955, at Randolph Air Force Base, a military reservation within the special territorial jurisdiction of the United States, in Bexar County, Texas, within the San Antonio Division of the Western District of Texas, GERALD H. SHARPNACK did, then and there, unlawfully and with lascivious intent, entice, allure and persuade Larry D. Pogreba, a male child under the age of fourteen years, to enter a room, to-wit: Room No. 28, Bachelor Officers' Quarters "B", located at the aforesaid Randolph Air Force Base, for the purpose of proposing that the said Larry D. Pogreba feel the sexual parts of him, the said GERALD H. SHARPNACK, in violation of Section 535(b) of the Penal Code of the State of Texas.

A true bill.

(S.) Wade R. Bedell
Foreman

Russell B. Wine
United States Attorney

[fol. 5] (File Endorsement Omitted)

[fol. 6] IN UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Criminal No. 21073

UNITED STATES OF AMERICA

vs.

GERALD H. SHARPNAK

(Viq. 18 U.S.C. 13 and Art. 535(b) and Art. 535(c), Texas Penal Code)

MOTION TO DISMISS

Now comes Defendant in the above entitled and numbered cause and moves the Court to dismiss the First

Count of the Indictment herein on the ground that this Honorable Court lacks jurisdiction of the offense alleged in said First Count for the following reasons:

Said First Count purports to charge an offense under Article 535(c), V.A.T.S. (Acts *1950*, 51st Leg., 1st C.S., p. 50, Ch. 9)[1] and attempts to assimilate said purported offense under the provisions of Section 13, Title 18, United States Code (Act June 25, *1948*, c. 645, 62 Stat. 683 et seq.) by reason of the allegation that said acts occurred on or about April 3, *1955*, within the special territorial jurisdiction of the United States; whereas any attempt to apply provisions of a state penal law enacted *subsequent* to the passage of Section 13, Title 18, United States Code, is void as an unconstitutional delegation of the legislative power of the Congress of the United States:

II

Now comes Defendant in the above entitled and numbered cause and moves the Court to dismiss the Second Count of the Indictment herein, on the ground that this Honorable Court lacks jurisdiction of the offense alleged in said Second Count for the following reasons:

Said Second Count purports to charge an offense under Article 535(b)[2], V.A.T.S. (Acts *1950*, 51st Leg., 1st C.S., p. 49, Ch. 8) and attempts to assimilate said purported offense under the provisions of Section 13, Title 18, United States Code (Act. June 25, *1948*, c. 645, 62 Stat. 683 et seq.) by reason of the allegation that said acts occurred [fol. 7] on or about April 3, *1955*, within the special territorial jurisdiction of the United States; whereas any attempt to apply provisions of a state penal law enacted *subsequent* to the passage of Section 13, Title 18, United States Code, is void as an unconstitutional delegation of the legislative power of the Congress of the United States.

III

Now comes Defendant in the above entitled and numbered cause and moves this Court to dismiss the Third

[1] Incorrectly indicated in Indictment as Art. 535(*b*)

[2] Incorrectly indicated in Indictment as Art. 535(*c*)

Count of the Indictment herein, on the ground that this Honorable Court lacks jurisdiction of the offense alleged therein for the following reasons:

Said Third Count purports to charge an offense under Article 535(c) V.A.T.S. (Acts *1950*, 51st Leg., 1st C.S., p. 50, Ch. 9)[1] and attempts to assimilate said purported offense under the provisions of Section 13, Title 18, United States Code (Act June 25, *1948*, c. 645, 62 Stat. 683 et seq.) by reason of the allegation that said acts occurred on or about April 3, *1955*, within the special territorial jurisdiction of the United States; whereas any attempt to apply provisions of a state penal law enacted *subsequent* to the passage of Section 13, Title 18, United States Code, is void as an unconstitutional delegation of the legislative power of the Congress of the United States.

IV

Now comes Defendant in the above entitled and numbered cause and moves this Court to dismiss the Fourth Count of the Indictment herein, on the ground that this Honorable Court lacks jurisdiction of the offense alleged therein for the following reasons:

Said Fourth Count purports to charge an offense under Article 535(b)[2] V.A.T.S. (Acts *1950*, 51st Leg. 1st C.S., p. 49, Ch. 8) and attempts to assimilate said purported offense under the provisions of Section 13, Title 18, United States Code (Act June 25, *1948*, c. 645, 62 Stat. 683 et seq.) by reason of the allegation that said acts occurred on or about April 3, 1955, within the special territorial jurisdic-
[fol. 8] tion of the United States; whereas any attempt to apply provisions of a state penal law enacted *subsequent* to the passage of Section 13, Title 18, United States Code, is void as an unconstitutional delegation of the legislative power of the Congress of the United States.

---

[1] Incorrectly indicated in Indictment as Art. 535(*b*)

[2] Incorrectly indicated in Indictment as Art. 535(*c*)

WHEREFORE, Defendant prays the Court to dismiss each and every count of the Indictment.

TRUEHEART, McMILLAN, RUSSELL & WESTBROOK By .....
713 National Bank of Commerce Bldg.
San Antonio, Texas
Attorneys for Defendant

[fol. 9] (Filed Jan. 3, 1956—Mary Hart, Clerk)
By J. E. Davis, Deputy

[fol. 10] IN UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

(Title Omitted)

STIPULATION ON DEFENDANT'S MOTION TO DISMISS—Filed September 14, 1956

Comes now the United States of America, represented herein by the United States Attorney for the Western District of Texas, and the defendant GERALD H. SHARPNACK, represented herein by his attorney, Joel Westbrook, and stipulate that the following facts are true and correct:

I.

That the defendant was indicted on December 12, 1955, in San Antonio Criminal No. 21073 in a four-count indictment alleging violation of 18 U.S.C. 13 and Article 535(b) and Article 535(c) of the Texas Penal Code.

II.

On or about January 3, 1956, the defendant filed a motion to dismiss in said criminal numbered indictment.

III.

On January 4, 1956, an indictment was returned in San Antonio Criminal No. 21104, charging the identical vio-

lations as set out in Paragraph I herein, except that certain typographical errors were corrected in San Antonio Criminal No. 21104 which appeared in San Antonio Criminal No. 21073.

[fol. 11] IV.

On January 6, 1956, the defendant urged a motion to dismiss. This motion to dismiss was originally filed in San Antonio Criminal No. 21073, but it was understood and agreed by the parties hereto and the Court that the motion to dismiss in San Antonio Criminal No. 21073 also applied with equal force and effect to San Antonio Criminal No. 21104.

SIGNED this, the 11th day of September, 1956.

(S.) Joel Westbrook
Joel Westbrook
Attorney for Defendant

(S.) Russell B. Wine
Russell B. Wine
United States Attorney

[fol. 12] (File Endorsement Omitted)

[fol. 13] IN UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Criminal No. 21104

UNITED STATES OF AMERICA

v.

GERALD H. SHARPNACK

ORDER DISMISSING INDICTMENT—Filed August 14, 1956

The Court, after having considered the defendant's motion to dismiss the indictment in the above cause, and considering the briefs submitted by counsel herein, is of the opinion that the defendant's motion should be granted, for the reason that Congress may not legislatively assimilate and adopt criminal statutes of a state which are

enacted by the state subsequent to the enactment of the Federal Assimilative Statute.

It is further the opinion of this Court that Section 13, Title 18, United States Code, enacted in 1948, wherein it assimilates and adopts said criminal statutes enacted by the state subsequent to the enactment of said section, to-wit: Articles 535(b) and 535(c) of the Texas Penal Statutes, enacted in 1950, upon which all four counts of this indictment are predicated, is a delegation of Congress' legislative authority to the states in violation of the Constitution of the United States.

For the reasons aforesaid, the indictment in this cause is DISMISSED.

SIGNED this, the 10 day of August, 1956.

(S.) Ben H. Rice, Jr.
Ben H. Rice, Jr.
United States District
Judge

ENTERED: Minute Volume X-1, Page 787.

[fol. 14] (File Endorsement Omitted)

[fol. 15] IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

(Title Omitted)

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES—
Filed September 10, 1956

I. Notice is hereby given that the United States appeals to the Supreme Court of the United States from the order entered August 14, 1956, dismissing the indictment which charged violations of 18 U.S.C. 13 and Texas Penal Code, Articles 535(b) and (c).

This appeal is taken pursuant to 18 U.S.C. 3731.

II. The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Transcript of docket entries
2. Indictment
3. Motion to dismiss the indictment, made in Cr. No. 21073, and stipulation making said motion applicable in this case, Cr. No. 21104
4. Order of the district court dismissing the indictment
5. Notice of appeal

[fol. 16] III. The following question is presented by this appeal:

18 U.S.C. 13 provides that any act or omission committed within the special maritime and territorial jurisdiction of the United States which, although not made punishable by an act of Congress, would be punishable if committed within the jurisdiction of the state in which such place is situated "by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment." The question is whether this statute constitutes an unconstitutional delegation of the legislative power of Congress in so far as it assimilates state laws enacted subsequent to the date of its enactment in 1948.

(S.) Russell B. Wine
United States Attorney
Western District of Texas

[fol. 17] (File Endorsement Omitted)

[fol. 18] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 19] SUPREME COURT OF THE UNITED STATES

No. 559 ——, October Term, 1956

(Title Omitted)

APPEAL from the United States District Court for the Western District of Texas.

ORDER NOTING PROBABLE JURISDICTION—January 14, 1957

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE 1957 — 427253 — 1304

No. 559

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, APPELLANT

v.

GERALD H. SHARPNACK

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

JURISDICTIONAL STATEMENT

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
ALBERT M. CHRISTOPHER,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

CITATIONS

Cases:

407062—56

Constitution and Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

GERALD H. SHARPNACK

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

JURISDICTIONAL STATEMENT

OPINION BELOW

The District Court (Rice, J.) did not write an opinion. A copy of the order dismissing the indictment is annexed (App., *infra*, p. 11).

JURISDICTION

On August 14, 1956, the United States District Court for the Western District of Texas entered an order dismissing the indictment on the ground that 18 U. S. C. 13, insofar as it assimilates state statutes enacted subsequent to the federal statute, is an unconstitutional delegation of legislative authority (App. *infra*, p. 11). A notice of appeal to this Court

was filed in the District Court on September 10, 1956. The jurisdiction of this Court to review on direct appeal an order dismissing an indictment, based on the invalidity of the statute upon which the indictment rests, is conferred by 18 U. S. C. 3731. *United States* v. *Harriss*, 347 U. S. 612.

STATUTE INVOLVED

18 U. S. C. 13 provides:

> Laws of States adopted for areas within Federal jurisdiction.
>
> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

QUESTION PRESENTED

Whether 18 U. S. C. 13 involves an unconstitutional delegation of the legislative power of Congress insofar as it assimilates state laws adopted after the effective date of the federal statute.

STATEMENT

A four-count indictment brought in the United States District Court for the Western District of Texas charged appellee with committing certain sex crimes at Randolph Air Force Base, a federal enclave in Texas, in violation of Sections 535 (b) and 535

(c) of the Texas Penal Code, as assimilated by 18 U. S. C. 13. The Texas statutes involved were enacted in 1950; the Assimilative Crimes Act was passed by Congress in the 1948 revision of the criminal laws.

On motion of the appellee, the District Court dismissed the indictment on the ground that 18 U. S. C. 13 constituted an unconstitutional delegation of legislative power to the states insofar as it undertook to assimilate state laws enacted subsequent to the enactment of the federal statute.

THE QUESTION IS SUBSTANTIAL

18 U. S. C. 13, as enacted by the 1948 revision of the criminal laws, provides that acts which at the time of commission would be a crime under the law of the state in which a federal enclave is situated shall be a crime when committed within the federal enclave. This is an express and realistic recognition of what has actually been the settled policy of Congress since the first Assimilative Crimes Act of March 3, 1825 (4 Stat. 115)—to make the criminal law of federal enclaves located within a state conform to the law of the surrounding state, except where federal legislation specifically governs.

Before 1948, because of the interpretation given to the Act of 1825 in the brief opinion in *United States* v. *Paul*, 6 Pet. 141, *i. e.*, that that Act assimilated state laws in force at the time of the federal enactment, it was deemed necessary to reenact the assimilative crimes statute periodically so as to keep abreast of changes in state law. This was done in 1866 (14 Stat. 12, 13); 1898 (30 Stat. 717); 1909 (35 Stat. 1088);

1933 (48 Stat. 152); 1935 (49 Stat. 394) and 1940 (54 Stat. 234). This method of assimilation did not fully effectuate the Congressional policy since there was always a lag in the assimilation of new or amended state laws. The 1948 amendment was designed to implement the Congressional policy more effectively and, in the words of the revisers, to make "unnecessary periodic pro forma amendments of this section to keep abreast of changes of local laws." The question here is whether this is beyond the constitutional power of Congress.

The importance of the question in the administration of criminal law within federal enclaves is self-evident. As we become further removed from the date of the 1948 enactment, the number of new state enactments which will be affected by Section 13 will increase. It is important that Congress know whether future legislation is necessary to keep abreast of changing state laws. Moreover, the implications of the decision may go beyond the subject matter of 18 U. S. C. 13, for in many fields Congress has seen fit to refer to provisions of state law for the purpose of federal legislation.

1. We think it unnecessary to judge this statute, viewed in relation to the problem with which it deals, in terms of concepts of delegation of legislative power developed in relation to acts of administrative agencies. There is not present here, as there is in the field of administrative law, any question as to the extent to which the elected representatives of the people may delegate law-making functions to non-elective bodies. And there is no problem of the separation of powers

as between the legislative and executive branches of the government. This is a problem arising out of, and peculiarly related to, our federal form of government with its dual spheres of sovereignty. Basically, 18 U. S. C. 13 represents an accommodation between the legislative functions of state and nation in a field—the area of the police power—where, despite the growth of federal jurisdiction, the interest of the state is still recognized as paramount. The simplest and most direct argument in support of the constitutionality of the statute is that the basic concepts which underlie our federal system of government permit Congress to recognize that, whereas for many purposes federal enclaves have been taken out of state jurisdiction, the state retains such an interest in the criminal conduct of persons physically within the state area that it is legitimate federal policy to adopt state policy in relation to that conduct.

This is what Congress has tried to do since 1825. It is clear by now, whatever may have been thought at the time of the *Paul* decision in 1832, that Congress, in its periodic re-enactments of the assimilative crimes statute, did not review the new laws of the various states but merely accepted state policy as federal policy for federal enclaves, without any scrutiny of the particular state statutes. What would be constitutional, if done *seriatim* by several and separate acts, should not become unconstitutional when the same result, founded on the same legislative policy, is accomplished by one act. Laws are normally passed to meet future events.

2. Article I, § 8, cl. 17, of the Federal Constitution, provides:

> The Congress shall have Power * * *
>
> * * * * *
>
> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; * * *.

This Court has held that the word "exclusive" does not mean "nondelegable." *District of Columbia* v. *Thompson Co.*, 346 U. S. 100, 109–110 (upholding a criminal conviction under acts of the District of Columbia legislative assembly passed pursuant to the Organic Act of February 21, 1871, 16 Stat. 419). As noted in the *Thompson* case, 346 U. S. at pp. 105–107, "The power of Congress over the District and its power over the Territories are phrased in very similar language in the Constitution." And

> * * * "The power which Congress constitutionally may delegate to a territory (subject of course to "the right of Congress to revise, alter, and revoke", *Hornbuckle* v. *Toombs*, 18 Wall. 648, 655) covers all matters "which, within the limits of a State, are regulated by the laws of the State only." *Simms* v. *Simms* [175 U. S. 162, 168].

While the *Thompson* case noted that, so far as the seat of the federal government is concerned, such powers may not be delegated to the surrounding states, different considerations apply to federal enclaves located *within* a state. Thus, this Court has held that the federal government may accept concurrent jurisdiction with the state over federal enclaves, so long as that does not operate to deprive the United States of the enjoyment of the property for the purposes for which it was acquired. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 141–149. See also *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 100–101; *Mason Co.* v. *Tax Commission*, 302 U. S. 186, 207–208. Moreover, since it is clear, as to federal areas (*e. g.*, territories) which are wholly outside the area of any state, that Congress may delegate power to enact police measures to representatives of the people of that area, it should follow, as to federal areas which are wholly within a state, that Congress may delegate similar powers to representatives of the people of that state. The standard of that delegation of power is clear. Congress has determined that federal enclaves within a state shall not be a refuge from the force and effect of state laws in the field where, under our Constitution, state power is paramount. The standard of congressional delegation is the standard of conformity to state law. As Mr. Justice Holmes stated in his dissent in *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, at p. 169 (involving the application of state workmen's compensation laws to maritime work):

> * * * I assume that Congress could not delegate to state legislatures the simple power to decide what the law of the United States should be in that district. But when institutions are established for ends within the power of the States and not for any purpose of affecting the law of the United States, I take it to be an admitted power of Congress to provide that the law of the United States shall conform as nearly as may be to what for the time being exists. * * *

We do not argue that Congress has unlimited power to adopt or follow the laws of the several states, but only that, with respect to the peculiar problem of federal enclaves located within a state, 18 U. S. C. 13 is an appropriate exercise of congressional power, providing for uniform and non-discriminatory application of state laws within such enclaves.

3. The decision below may have implications in other areas of federal legislation, both criminal and civil, in which Congress has employed other devices of reference to state law.

The Webb-Kenyon Act of March 1, 1913, 27 U. S. C. 122 (37 Stat. 699), prohibited the shipment or transportation of intoxicating liquors into a state to be used "* * * in violation of any law of such State". West Virginia subsequently enacted a prohibition law. In *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U. S. 311, 326, this Court upheld the constitutionality of the federal act, stating that there was

no proscribed delegation of power because the will which causes the prohibitions to be applicable is that of Congress. Mr. Justice Holmes considered the holding in the *Clark* case as "* * * justifying the adoption of state legislation in advance". *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 169 (dissenting opinion). See also the Reed Amendment to the Webb-Kenyon Act (39 Stat. 1058, 1069), held constitutional in *United States* v. *Hill*, 248 U. S. 420.

The Liquor Enforcement Act of 1936, 27 U. S. C. (1946 ed.) 223 (49 Stat. 1928–1930), prohibited the transportation of liquor into a state unless accompanied "* * * by such permit or permits, license or licenses therefor as are now *or hereafter required by the laws of such State*" (emphasis added).[1] Congress has also adopted comparable legislation with respect to interstate shipments of convict-made goods. *Whitfield* v. *Ohio*, 297 U. S. 431; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334.

Another example of a statute which incorporates into federal criminal law the present and future laws of the states is the Fugitive from Justice Act, 18 U. S. C. 1073. See *Hemans* v. *United States*, 163 F. 2d 228 (C. A. 6), certiorari denied, 332 U. S. 801. See also 18 U. S. C. 43; 15 U. S. C. 1171–1177; 15 U. S. C. 715 *et seq.*

---

[1] The constitutionality of that Act was upheld in *Hayes* v. *United States*, 112 F. 2d 417 (C. A. 10), but the prospective feature of the statute was not involved.

In the civil field, the Federal Tort Claims Act bases the liability of the United States upon standards established by state law. 28 U. S. C. 1346 (b). See e. g., *Stewart* v. *United States*, 186 F. 2d 627, 630–631 (C. A. 7), certiorari denied, 341 U. S. 940.

The Bankruptcy Act similarly draws upon state law in numerous respects. Thus, 11 U. S. C. 24 provides that the Bankruptcy Act shall not affect the allowance to bankrupts of exemptions prescribed "* * * by the State laws *in force at the time of the filing of the petition* * * *" (emphasis added). This Court unanimously held this section constitutional in *Hanover National Bank* v. *Moyses*, 186 U. S. 181, 189–190. Without specifically alluding to the fact that the statute, on its face, would apply to both present and future laws, the Court ruled that there was no unlawful delegation of legislative power.

Under 50 U. S. C. App. 1894 (i) (1) and (2), provisions were made for states to remove their areas from federal rent control provisions either by passing rent control legislation of their own or by determining that rent control was unnecessary. This Court summarily upheld the constitutionality of these sections. *United States* v. *Shoreline Cooperative Apartments*, 338 U. S. 897 (per curiam), reversing *Woods* v. *Shoreline Cooperative Apartments*, 84 F. Supp. 660 (N. D. Ill.).[2]

---

[2] For other civil statutes in which Congress has conditioned federal action on actions or determinations by the states, see *Gauley Mountain Coal Co.* v. *Director of U. S. B. of Mines*, 224 F. 2d 887, 890–891 (C. A. 4), and cases there cited.

CONCLUSIONS

The instant case raises a substantial and important question arising under the Constitution and laws of the United States. This Court should note jurisdiction of the appeal.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
ALBERT M. CHRISTOPHER,
Attorneys.

NOVEMBER 1956.

APPENDIX

In the United States District Court, Western District of Texas, San Antonio Division

Criminal No. 21104

UNITED STATES OF AMERICA

v.

GERALD H. SHARPNACK

ORDER DISMISSING INDICTMENT

The Court, after having considered the defendant's motion to dismiss the indictment in the above cause, and considering the briefs submitted by counsel herein, is of the opinion that the defendant's motion should be granted, for the reason that Congress may not legislatively assimilate and adopt criminal statutes of a state which are enacted by the state subsequent to the enactment of the Federal Assimilative Statute.

It is further the opinion of this Court that Section 13, Title 18, United States Code, enacted in 1948, wherein it assimilates and adopts said criminal statutes enacted by the state subsequent to the enactment of said section, to-wit: Articles 535 (b) and 535 (c) of the Texas Penal Statutes, enacted in 1950, upon which all four counts of this indictment are predicated, is a delegation of Congress' legislative authority to the states in violation of the Constitution of the United States.

For the reasons aforesaid, the indictment in this cause is DISMISSED.

SIGNED this, the 10 day of August 1956.

(Signed) BEN H. RICE, JR.,
United States District Judge.

ENTERED: Minute Volume X-1, Page 787.

No. 35

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, *Appellant*

v.

GERALD H. SHARPNACK

On Appeal from the United States District Court
for the Western District of Texas
San Antonio Division

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General;

WARREN OLNEY III,
Assistant Attorney General,

LEONARD B. SAND,
Assistant to the Solicitor General,

BEATRICE ROSENBERG,
ALBERT M. CHRISTOPHER,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

CITATIONS

CASES:

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 35

UNITED STATES OF AMERICA, *Appellant*

v.

GERALD H. SHARPNACK

On Appeal from the United States District Court for the Western District of Texas San Antonio Division

BRIEF FOR THE UNITED STATES

OPINION BELOW

The District Court (Rice, J.) did not write an opinion. A copy of the order dismissing the indictment is set forth at R. 7-8.

JURISDICTION

On August 14, 1956, the United States District Court for the Western District of Texas entered an order dismissing the indictment on the ground that 18 U.S.C. 13

(The Assimilative Crimes Act), insofar as it assimilates state statutes enacted subsequent to the federal statute, is an unconstitutional delegation of legislative authority (R. 7-8). A notice of appeal to this Court was filed on September 10, 1956 (R. 8-9). This Court noted probable jurisdiction of the appeal on January 14, 1957 (R. 10). The jurisdiction of this Court to review on direct appeal an order dismissing an indictment, based on the invalidity of the statute upon which the indictment rests, is conferred by 18 U.S.C. 3731. *United States* v. *Harriss*, 347 U.S. 612.

QUESTION PRESENTED

Whether 18 U.S.C. 13 involves an unconstitutional delegation of the legislative power of Congress insofar as it assimilates state laws adopted after the effective date of the federal statute.

STATUTE INVOLVED

18 U.S.C. 13 provides:

> *Laws of States adopted for areas within Federal jurisdiction.* Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

STATEMENT

A four-count indictment brought in the United States District Court for the Western District of Texas

charged appellee with committing certain sex crimes involving two male children at Randolph Air Force Base, a federal enclave in Texas, in violation of Sections 535(b) and 535(c) of the Texas Penal Code, as assimilated by 18 U.S.C. 13, *supra* (R. 1-3). The Texas statutes involved were enacted in 1950; the Assimilative Crimes Act was passed by Congress in the 1948 revision of the federal criminal laws.

On August 14, 1956, the District Court entered an order granting appellee's motion to dismiss the indictment on the ground that 18 U.S.C. 13 constituted an unconstitutional delegation of legislative power to the states insofar as it undertook to assimilate state laws passed subsequent to the enactment of the federal statute (R. 7-8).

SUMMARY OF ARGUMENT

I

It has always been the policy of Congress to make the criminal law of federal enclaves conform to the law of the surrounding state except to the extent that Congress has otherwise provided.

The first Assimilative Crimes Act of March 3, 1825 (4 Stat. 115) simply provided that in all cases in which Congress had not specifically provided for the punishment of crimes on federal enclaves the offender would "receive the same punishment as the laws of the state * * * provide for the like offence when committed within * * * such state". The stated purpose of the legislation was to provide for the punishment of those offenses not specifically prohibited by Congress, in the same manner as they had been punished before the cession of the enclave to the federal government. 1

Register of Debates in Congress 338, Gales and Seaton (18th Cong., 2d Sess.).

The congressional purpose was apparently frustrated, in part, by this Court in 1832 in *United States v. Paul*, 6 Pet. 141, 142, in which the 1825 Act was construed to be limited to the adoption of state laws in effect at the time of its enactment. Chief Justice Marshall, who wrote the opinion of the Court, gave no reason for thus limiting the application of the act.

Thereafter until 1948, the *Paul* decision was thought by the Congress to restrict assimilative legislation (enacted in 1866, 1898, 1909, 1933, 1935 and 1940), although the extent of prospective application was gradually increased. Finally, in 1948, Congress ceased to regard the *Paul* decision as a ruling that Congress could not validly adopt future state legislation for federal enclaves. The 1948 amendment to the Assimilative Crimes Act (18 U.S.C. 13) adopted the state law in force at the time of the alleged offense—giving effect to all interim repeals, additions, and amendments enacted by the state legislature. The present Act is thus an express and realistic recognition of the federal policy of conformity which has existed for over 125 years and, in the words of the revisers, makes "unnecessary periodic pro forma amendments of this section to keep abreast of changes of local laws."

II

The federal policy of conformity, as presently expressed in 18 U.S.C. 13, is a valid exercise of congressional powers.

A. The present statute furthers an approved federal policy. This Court has ruled that it is valid for Congress to differentiate among activities on various fed-

eral enclaves on the basis of the state law surrounding those enclaves, *i.e.*, Congress can have one set of criminal laws governing federal enclaves in one state and a different set in another state. Cf. *Franklin* v. *United States*, 216 U.S. 559; *United States* v. *Paul*, 6 Pet. 141. The dominant factor is not nationwide uniformity (as it is with general federal legislation on crime), but rather conformity to the criminal law of the particular state where that law does not conflict with any other express federal policy. Therefore, it seems wholly reasonable, and more in accord with such a policy, to make the federal law conform to the state law at the time of the offense rather than to state law at the time of the federal enactment, as was done prior to the 1948 statute. Cf. Justice Holmes' dissent in *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 169. The policy of conformity is, of course, better served if the law of the federal enclave contemporaneously parallels that of the surrounding state. Limiting conformity to state law as of a set date would render the law operative on the federal enclave anachronistic. Newly arising problems may be dealt with by the legislatures of the surrounding states. It cannot be assumed that time stands still on the federal enclave.

The Assimilative Crimes Act represents an accommodation between the legislative functions of state and nation in the field of police power where, despite the growth of federal jurisdiction, the interest of the state is still recognized as paramount. Federal enclaves have been removed from state jurisdiction for many purposes, but the state retains such an interest in the criminal conduct of persons physically within the exterior boundaries of the state that it seems reasonable to adopt state policy in relation to that conduct unless

Congress has seen fit to have a different specific federal policy prevail. Under our dual system of government, Congress has the right to say that federal enclaves within a state shall not become a haven of escape from the public policy of the state with respect to criminal acts. See *United States* v. *Press Publishing Co.*, 219 U.S. 1, 9-10. What would be constitutional if done *seriatim*, by several and separate acts, should not become unconstitutional when the same result, founded on the same legislative policy, is accomplished by one act.

The construction placed on the first Assimilative Crimes Act by Chief Justice Marshall in the *Paul* case, 6 Pet. 141, to the effect that the federal government was adopting only those state laws in existence at the time of the enactment, and the assumption thereafter, before 1948; that this construction was constitutionally required, stemmed from philosophical considerations and rested on factual premises which appear to have no present day validity. Marshall's idea of "exclusive" national supremacy, which doubtless underlies the belief that it would be necessary for the federal government to scrutinize and supervise the state law which it adopted, no longer prevails. See *Freeman* v. *Hewit*, 329 U.S. 249, 262 (concurring opinion).

Moreover, it is now clear, whatever may have been thought at the time of the *Paul* decision, that Congress, in its periodic reenactments of the act, did not review the new laws of the various states but merely accepted, to the extent that it had not otherwise legislated, state statutes, to be enforced as federal law for federal enclaves, without any scrutiny of the particular state statutes. Therefore, it remains true under the present, as under former statutes, that the federal courts, in applying 18 U.S.C. 13, will be applying federal law

adopted by Congress in implementation of a valid federal policy. Moreover, state statutes explicitly or by implication inconsistent with federal policy are not assimilated under the Act, and, of course, Congress is always free to exclude any state statute from its application. Usurpation of control by the states over policies to govern in federal enclaves is not therefore even theoretically a danger created by the Act.

B. The federal policy of contemporaneous conformity underlying the instant statute, that Congress can adopt the current law of the state in a particular aspect, has been applied to encompass future state legislation in many fields where the early *Paul* decision (6 Pet. 141) was not considered to have an inhibiting effect. In the field of criminal law, see, *e.g.*, the Webb-Kenyon Act of March 1, 1913, 27 U.S.C. 122 (37 Stat. 699); the Liquor Enforcement Act of 1936, 27 U.S.C. (1946 ed.) 223 (49 Stat. 1928-1930); and the Fugitive from Justice Act, 18 U.S.C. 1073 (62 Stat. 755). In the civil field, see, *e.g.*, the Federal Tort Claims Act, 28 U.S.C. 1346(b) (63 Stat. 62); the Bankruptcy Act, 11 U.S.C. 24; and 50 U.S.C. 1894(i)(1) and (2) (63 Stat. 25), where provisions were made for states to remove their areas from federal rent control provisions either by passing rent control legislation of their own or by determining that rent control was unnecessary.

III

The Assimilative Crimes Act, we submit, does not involve an unconstitutional delegation of legislative power. Congress, by enacting 18 U.S.C. 13, did not delegate special power to the state legislature to decide what should be the law for a federal enclave. The sec-

tion merely provides that when the state legislature changes the general law for the surrounding state area, in the legitimate exercise of its police power, the changes will apply in the federal area as well. The state legislature is primarily legislating for the whole state and only incidentally affecting the federal area.

Of course, when the federal government assumes the police power formerly held by a state as an incident of a cession of jurisdiction, and Congress then provides for an adjustment between the legislative functions of state and nation within the area of that power by adopting some state law as it has done in 18 U.S.C. 13, it may be said that the resultant accommodation is a delegation of legislative power. But such a "delegation" is not unconstitutional. The provisions in Article I, § 8, cl. 17, of the Constitution directing that Congress shall "exercise exclusive Legislation" over federal enclaves is not mandatory. *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 141-149. The purpose of the provision was to ensure to the United States the use of the property for the purpose of which it was acquired. Congress has effectuated that purpose by allowing the "delegation" involved here. Moreover, it has been specifically held by this Court that the word "exclusive" in clause 17 does not mean "non-delegable". *District of Columbia* v. *Thompson Co.*, 346 U.S. 100, 109, 110.

Congress also has "exclusive" power over the territories of the United States. *United States* v. *California*, 332 U.S. 19; *Scott* v. *Pilot*, 6 Cranch 332, 336. But Congress delegates legislative power to the territories. *District of Columbia* v. *Thompson Co.*, *supra*. Since Congress may delegate power to enact police measures to the representatives of the people in such federal areas (*e.g.*, territories) which are wholly

outside the area of any state, Congress should be allowed to delegate similar powers, as to federal areas which are wholly within a state, to representatives of the people of that state. As a practical matter, "home rule" obviously could not be granted to each of the federal enclaves. But the Assimilative Crimes Act enables the public will of the people most nearly situated in like position to those on the federal enclave to be reflected in the criminal laws operative in that enclave, where there is no conflict with any federal policy.

The standard of the delegation involved here is clear. Congress has determined that federal enclaves within a state shall not be a refuge from the force and effect of state laws in the field where, under our Constitution, state power is paramount. The standard of congressional delegation is the standard of conformity to state law. See Mr. Justice Holmes' dissent in *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 169.

ARGUMENT

The Assimilative Crimes Act, as enacted by the 1948 revision of the criminal laws, provides that acts which at the time of commission would be a crime under the law of the state in which a federal enclave is situated shall be a crime when committed within the federal enclave. This is an express and realistic recognition of what has been the settled policy of Congress since the first Assimilative Crimes Act of March 3, 1825 (4 Stat. 115)—to make the criminal law of federal enclaves located within a state conform to the law of the surrounding state, except where federal legislation otherwise governs. It is the position of the government that nothing in the Constitution prevents Congress from adopting such a policy for federal enclaves and implementing it as in the present statute.

I

THE HISTORY OF THE ASSIMILATIVE CRIMES ACT SHOWS THAT IT HAS ALWAYS BEEN FEDERAL POLICY TO MAKE THE CRIMINAL LAW OF FEDERAL ENCLAVES CONFORM TO THE LAW OF THE SURROUNDING STATE EXCEPT TO THE EXTENT THAT CONGRESS HAS OTHERWISE PROVIDED

A. *The first Assimilative Crimes Act, 1825.* One of the early problems resulting from the creation of federal enclaves was the administration of criminal law over those areas. When a state ceded territory to the federal government, that area was left without criminal law, in the absence of Congressional legislation. In 1790, Congress passed the first Federal Crimes Act (1 Stat. 112) in an attempt to correct this situation. This act, however, defined only the crimes of murder, misprision of felony for concealing a murder, manslaughter, maiming and larceny—punishing their commission in areas under the "sole and exclusive jurisdiction of the United States". Receiving stolen goods and harboring felons were proscribed "within any part of the jurisdiction of the United States". Persons who committed other offenses on federal enclaves escaped unpunished. 1 *Life and Letters of Jos. Story* 297 (1851). By 1825, the gravity of the situation led Congress to provide a more comprehensive system of criminal law for ceded areas. On March 3, 1825, Congress passed the first assimilative crimes statute, Section 3[1] of "An Act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes" (4 Stat. 115), which provided:

---

[1] Sections 1 and 2 of the 1825 Act provided punishment for arson committed "within any fort, dock-yard, navy-yard, arsenal, armory, or magazine * * * or other needful building belonging to the United States", thus specifically adding another crime to those enumerated in the 1790 Act.

> *And it be further enacted*, That, if any offence shall be committed in any of the places aforesaid, the punishment of which offence is not specifically provided for by any law of the United States, such offence shall, upon a conviction in any court of the United States having cognisance thereof, be liable to, and receive the same punishment as the laws of the state in which such fort, dock-yard, navy-yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provide for the like offence when committed within the body of any county of such state.

Mr. Webster of Massachusetts, who sponsored the legislation, explained that the purpose of the section was to provide for the punishment of those offenses not specifically prohibited by Congress in the same manner as they had been punished before the cession of the enclave to the federal government. 1 *Register of Debates in Congress* 338, Gales and Seaton (18th Cong., 2d Sess.); see also *United States* v. *Davis*, 25 Fed. Cas. 781, 784 (C.C.D. Mass.)

This Court, however, in 1832 construed the act as limited to the adoption of state laws in effect at the time of its enactment. *United States* v. *Paul*, 6 Pet. 141, 142 (involving an 1829 act of the New York legislature, which was held not to apply under the Assimilative Crimes Act to the West Point Military Reservation). Chief Justice Marshall, who rendered the brief opinion of the Court, gave no reason for thus limiting the application of the act.[2] Nevertheless, the *Paul* de-

[2] The entire text of the opinion reads as follows: "Marshall, Ch. J., stated it to be the opinion of the court, that the third section of the act of congress, entitled 'an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes,' passed March 3d, 1825, is to be

cision was regarded as a ruling that Congress could not validly adopt future state legislation for federal enclaves. For that reason it was, until 1948, deemed necessary to reenact the assimilative crimes statute periodically to keep abreast of changes in state law. This was done in 1866, 1898, 1909, 1933, 1935, and 1940. Even so, as we show below, to the extent that it deemed itself free under the *Paul* decision, Congress disclosed an intent to make federal crime on an enclave conform as nearly as possible to the state law as it existed at the time of the crime rather than at the time of the federal enactment.

B. *Reenactments of the Assimilative Crimes Act, 1866-1940.* The Act of April 5, 1866 (14 Stat. 12-13), adopted state law in existence at the time of its enactment and extended the scope of the original act to "any place which has been, or *shall hereafter* be, ceded" to the United States (emphasis added). This provision remedied the situation brought about by *United States* v. *Barney*, 24 Fed. Cas. 1011 (S.D. N.Y.), which held that the original act would not apply to any areas ceded to the federal government by the states after March 3, 1825. Thus Congress showed that it had one general policy of conformity to state law for all federal enclaves, future as well as present.

The next expansion of the statute beyond the constraints initially deemed to have been imposed by the *Paul* decision came in 1933. The reenactments in 1866,[3]

---

limited to the laws of the several states in force at the time of its enactment. This was ordered to be certified to the circuit court for the southern district of New York."

The case had been submitted to the Court without argument.

[3] Act of April 5, 1866, 14 Stat. 12, 13.

1898,[4] and 1909[5] had all adopted state laws existing on the date of the federal enactment ("now in force") and under those statutes a subsequent repeal of a state law would not act as a pro tanto repeal for the federal enclave within that state. The acts in force from 1933 to 1948,[6] on the other hand, adopted the state criminal laws existing on the date of the adoption of the federal act, but only if those laws remained in force at the time of the commission of the offense.[7] If the act was not a crime by state law at the time when committed, it was not a crime under federal law. Although the Act as it thus read was applied on numerous occasions the question whether this method of assimilation was an unconstitutional delegation of legislative power to the states is one which, for obvious reasons, appears not to have been litigated.[8]

---

[4] Act of June 7, 1898, 30 Stat. 717.

[5] Criminal Code, Act of March 4, 1909, 35 Stat. 1088, 1145.

[6] Act of June 15, 1933, 48 Stat. 152; Act of June 20, 1935, 49 Stat. 394; Act of June 6, 1940, 54 Stat. 234.

[7] The Act of June 11, 1940 (54 Stat. 304), extended the scope and operation of the Assimilative Crimes Act by making it applicable to lands under the concurrent as well as the exclusive jurisdiction of the United States. For a discussion of the criminal jurisdiction of the United States over federal enclaves on exclusive, concurrent, partial and proprietorial bases, see the *Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States*, pt. II, pp. 105-115 (1957).

[8] The constitutionality of the 1898 Act had been sustained by this Court in *Franklin* v. *United States*, 216 U.S. 559, on the ground that the adoption of state law in effect at the time of the enactment was not an unconstitutional delegation of federal power to the states. See *infra*, pp. 17-18.

Of course, the policy of conformity would be in part frustrated if legislation tried by the people of the surrounding state

Congress further exhibited its interest in having the criminal law in federal enclaves conform to surrounding state law by the frequency with which it reenacted the assimilative crimes act to make the law of the enclaves current with state law in the period from 1933 to 1948. There were as many reenactments in the fifteen year period between 1933 and 1948 (1933, 1935, 1940, 1948), as in the period of over a hundred years from 1825 to 1933 (1866, 1898, 1909, 1933).[2] These reenactments had no purpose beyond having the federal law conform as closely as possible to effective state laws in the surrounding areas in those fields where federal laws did not apply. That was the policy of contemporaneous conformity which the 1948 Act expressly articulated.

C. The Assimilative Crimes Act of 1948. The present Assimilative Crimes Statute (18 U.S.C. 13) was enacted on June 25, 1948 (62 Stat. 686) in the revision and codification of Title 18 of the United States Code. It provides:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as pro-

and specifically found to be unsatisfactory were continued in force on the federal enclave. Although the 1933 modification of the Assimilative Crimes Act reduced to a large extent the tendency of the law operative on the federal enclave to become anachronistic, it did not provide any means by which the popular response to a new situation could be reflected in the law of the enclave.

[2] In 1933 there was an attempt to put the statute in its present form but the proposed amendment died and the legislative history fails to disclose the reason. H. Rep. No. 263, 73rd Cong., 1st Sess.; 77 Cong. Rec. 5530-5532; 5929. When the statute was again reenacted in 1935, Congress evidently felt that the *Franklin* case, 216 U.S. 559, interpreted the *Paul* decision of 1832 as proscribing the assimilation of future state laws. H. Rep. No. 1022, 74th Cong., 1st Sess.

> vided in section 7 of this title,[10] is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

The present statute adopts the state law in force at the time of the alleged offense, thus giving effect to all repeals, additions, and amendments enacted by the state legislature.[11] It thereby does away with the hiatus between reenactments of the statute, during which acts punishable under state law passed subsequent to the last assimilation would not be punishable on a federal enclave. The 1948 amendment was designed to implement the congressional policy of conformity more effectively and, in the words of the revisers, to make "unnecessary periodic pro forma amendments of this section to keep abreast of changes of local laws." Reviser's Note, 18 U.S.C., following § 13.

---

[10] Section 7 of Title 18 merely defines the term "special maritime and territorial jurisdiction of the United States," in pertinent part as follows:

"(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building."

[11] The statute thus adopts what has been termed a principle of "dynamic conformity," as opposed to "static conformity." Hart and Wechsler, *The Federal Courts and the Federal System*, 1091-92 (1953).

For the most part Congress has chosen to make only minor crimes conform to local law. Today, the following crimes on federal enclaves are specifically proscribed by federal statute: arson (18 U.S.C. 81); assault (18 U.S.C. 113); maiming (18 U.S.C. 114); larceny (18 U.S.C. 661); receiving stolen property (18 U.S.C. 662); false pretenses "upon any waters or vessel within the special maritime and territorial jurisdiction of the United States" (18 U.S.C. 1025); murder (18 U.S.C. 1111); manslaughter (18 U.S.C. 1112); attempted murder or manslaughter (18 U.S.C. 1113); malicious mischief (18 U.S.C. 1363); rape (18 U.S.C. 2031); carnal knowledge (18 U.S.C. 2032); and robbery (18 U.S.C. 2111).

Some serious offenses, not specifically provided for by Congress, have been prosecuted under the Assimilative Crimes Act. *E.g.*, burglary: *Dunaway* v. *United States*, 170 F. 2d 11 (C.A. 10); sodomy: *United States* v. *Gill*, 204 F. 2d 740 (C.A. 7); embezzlement: *United States* v. *Titus*, 64 F. Supp. 55 (D. N.J.). However, the overwhelming majority of offenses committed by civilians on federal enclaves are petty misdemeanors such as traffic violations and drunkenness, which are peculiarly local in nature and which can be punished only under the Act. *Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States*, pt. II, p. 135 (1957).

There is, we submit, much to be said in favor of the legislative judgment to have the law governing these peculiarly local crimes conform to that enacted by the people of the surrounding state; and the extent to which the policy of conformity shall govern in federal enclaves is, of course, a matter of legislative judgment. Our point here is that the policy of precise conformity,

except to the extent that Congress has provided otherwise, is and has been the dominant federal policy for 125 years. The realistic implementation of that policy by the terms of the present statute is, as we show below, within the constitutional power of Congress.

II

THE PRESENT ASSIMILATIVE CRIMES ACT IS AN EXPRESSION OF A VALID SETTLED FEDERAL POLICY

The language of the Assimilative Crimes Act itself shows what the history of the law makes even clearer, that this statute does not improperly delegate the legislative function of Congress. The statute is the expression of a valid settled federal policy with respect to federal enclaves generally—a policy of having the laws of such enclaves conform to the laws of the surrounding states except in those areas where Congress has chosen to legislate otherwise.

A. *The present statute furthers federal policy.* The most compelling argument in support of the constitutionality of the instant statute is that the concepts which underlie our federal system of government permit Congress, in framing federal laws for federal enclaves, to adopt the policy of having federal law for such areas conform, to the extent desired by Congress, to that of the surrounding states. The consideration which makes the Assimilative Crimes Act a valid exercise of congressional power, whether in its former or in its present form, is that there is a valid basis for the congressional policy of making the criminal law of federal enclaves conform to some extent to that of surrounding state areas.

The rationale which supports the decision in *Franklin* v. *United States*, 216 U.S. 559, upholding the con-

stitutionality of the statute in relation to offenses created by the law of the state in effect at the time of the federal enactment, will, upon analysis, support the constitutionality of the present statute making state law at the time of the offense the governing consideration. This Court, in the *Franklin* decision, 216 U.S. at p. 568, cited *United States* v. *Paul*, 6 Pet. 141, to the effect that the section was "limited to the laws of the several States in force at the time of its enactment" and then said:

> * * * it followed that by this act Congress adopted for the government of the designated places, under the exclusive jurisdiction and control of the United States, the criminal laws then existing in the several States within which such places were situated, in so far as said laws were not displaced by specific laws enacted by Congress.

Thus, the *Paul* and *Franklin* decisions show that it is valid for Congress to differentiate among activities on various federal enclaves on the basis of the particular state law surrounding those enclaves. Nationwide uniformity is not required. If that is the federal policy, as it clearly is, and if that is a valid policy, as this Court has held, then it is reasonable, and more in accord with that policy, to make the federal law conform to the state law at the time of the offense rather than to the state law at the time of the federal enactment. Limiting conformity to state law as of a set date—*i.e.*, static conformity—would render the law operative on the federal enclave anachronistic. Newly arising problems may be dealt with by the legislatures of the surrounding states. It should not be assumed that time stands still on the federal enclave. In the words of Justice Holmes' dissent in *Knickerbocker*

Ice Co. v. *Stewart*, 253 U.S. 149, 168, Congress has the right "to provide that the law of the United States shall conform as nearly as may be to what for the time being exists."[12]

We think there can be no serious question of the validity of the general federal policy of conformity, which as we have shown underlies both the prior version of the statute and its present form. Considering our dual system of government, Congress has the right to say that federal enclaves within a state shall not become a haven of escape from the public policy of that state with respect to criminal acts.

The Assimilative Crimes Act represents an accommodation between the legislative functions of state and nation in a field—the area of the police power—where, despite the growth of federal jurisdiction, the interest of the state is still recognized as paramount. Whereas for many purposes federal enclaves have been removed from state jurisdiction, the state retains such an inter-

---

[12] This Court has never said, by way of dicta or otherwise, that federal assimilation of future state laws would be unconstitutional. In *Johnson* v. *Yellow Cab Co.*, 321 U.S. 383, the Court declined to decide the applicability of the statute to the facts under review, finding it more feasible to affirm the judgment on other grounds. A minority of two, in a dissenting opinion written by Mr. Justice Frankfurter, thought the statute should be applied and took the occasion to review the 1825 Act and its later reenactments. The opinion did not say that Congress could not make future state laws applicable under Section 13.

In *Franklin* v. *United States*, 216 U.S. 559, 568-569, the Court upheld the constitutionality of the then existing act, saying, "There is, plainly, no delegation to the States of authority in any way to change the criminal laws applicable * * *". It is possible to strain from the quoted language an implication that if the section had assimilated future state laws the Court would have found an unconstitutional delegation. However, this question was not before the Court, and even as dictum such a construction is not manifest.

est in the criminal conduct of persons physically within the state that it is a legitimate federal policy to adopt state policy in relation to that conduct. This Court approved of such a policy in *United States* v. *Press Publishing Co.*, 219 U.S. 1, 9-10, when it said:

> * * * while the statute [the 1898 Assimilative Crimes Act (30 Stat. 717)] leaves no doubt where acts are done on reservations which are expressly prohibited and punished as crimes by a law of the United States, that law is dominant and controlling, yet, on the other hand, where no law of the United States has expressly provided for the punishment of offenses committed on reservations, all acts done on such reservations which are made criminal by the laws of the several States are left to be punished under the applicable state statutes. When these results of the statute are borne in mind it becomes manifest that Congress, in adopting it, sedulously considered the two-fold character of our constitutional government, and had in view the enlightened purpose, so far as the punishment of crime was concerned, to interfere as little as might be with the authority of the States on that subject over all territory situated within their exterior boundaries, and which hence would be subject to exclusive state jurisdiction but for the existence of a United States reservation. In accomplishing these purposes it is apparent that the statute, instead of fixing by its own terms the punishment for crimes committed on such reservations which were not previously provided for by a law of the United States, adopted and wrote in the state law, with the single difference that the offense, although punished as an offense against the United States, was nevertheless punishable only in the way and to the extent that it would have been punishable if the territory embraced by the reservation remained subject to the jurisdiction of the State. * * *

See also Justice Frankfurter's dissent in *Johnson* v. *Yellow Cab Co.*, 321 U.S. 383, 398-402; cf. Justice Brandeis' dissent in *Washington* v. *Dawson & Co.*, 264 U.S. 219, 234-235; see Note, 70 Harv. L. Rev. 685 (1957).

What would be constitutional if done *seriatim*, by several and separate acts, should not, we submit, become unconstitutional when the same result, founded on the same legislative policy, is accomplished by one statute. Under the cooperative concept of the federal relationship reflected in this Act, the states and the federal government operate as mutually complementary parts of a single governmental mechanism, all of whose powers are intended to realize the current purposes of government according to the applicability to the problem at hand.[13]

The construction placed on the first Assimilative Crimes Act by Chief Justice Marshall in the *Paul* case, 6 Pet. 141, to the effect that the federal government was adopting only those state laws in existence at the time of the enactment, and the assumption thereafter, before 1948, that this construction was constitutionally required, stemmed from philosophical considerations and rested on factual premises which appear to have no present-day validity. Marshall and many of his contemporaries were particularly concerned with main-

[13] The reasonableness of such a congressional policy was aptly stated by this Court in *Hoke* v. *United States*, 227 U.S. 308, 322:

> Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction * * * but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. * * *

taining the principle of national supremacy in the newly-formed federation of states. Corwin, *The Constitution of the United States of America; Analysis and Interpretation with Annotations* (1953), p. xxvi, Sen. Doc. No. 170, 82d Cong., 2d Sess. It would be natural for them, in the days when the central government was comparatively weak, to view the prospective adoption of any state law as a concession to the state of a jealously guarded federal power, even though in the field of police power the interest of the state was constitutionally paramount. In his zeal to prevent any weakening of the principle of national supremacy, Marshall adhered to a theory of constitutional jurisprudence in this respect which assumed the state and central governments were bent on mutual frustration, and that it would be necessary for the federal government to scrutinize and supervise the state law which it adopted. The theory seems to have been, as the government argued in the *Franklin* case (see 216 U.S. at p. 566), that the "act had precisely the same effect as if all the criminal statutes of such States, creating offenses for which punishment had not been provided by congressional legislation, had been set forth *in extenso* in the body of the act." See *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 266.

Today, however, the power of the federal government is firmly established. Marshall's "exclusive" idea no longer prevails. See *Freeman* v. *Hewit*, 329 U.S. 249, 262 (concurring opinion). As a result, the present Assimilative Crimes Act can now be viewed more realistically on its merits. It seems clear today by virtue of the history of our federal system and the terms of the Assimilative Crimes Act that there is no real danger that the states will usurp legislative control of federal

enclaves. The supreme plenary power of Congress has not been diminished because it is the will of Congress that has caused some state criminal laws to be assimilated. Congress could at any time abandon its policy, in part or in full, of making some state standards of criminal conduct applicable to federal enclaves within the state. And when Congress speaks, its will, of course, prevails. Thus, if Congress makes punishable any act or omission or indicates a purpose to cover a general area of criminal conduct, a state statute covering the same conduct will not be assimilated under the terms of the statute.

For example, in *Williams* v. *United States*, 327 U.S. 711, the question before the court was whether the Assimilative Crimes Act made Arizona law applicable to the case of a married white man, who, on a federal enclave in Arizona, had sexual intercourse, with an unmarried Indian girl then over 16 but under 18 years of age. The Arizona "statutory rape" law fixed age 18 as the age of consent. Section 279 of the federal Criminal Code, defining the crime of carnal knowledge, fixed 16 as the age of consent. In holding that the Arizona statute was not assimilated because Congress made known an intent to cover rape and related offenses by federal penal legislation, the Court noted that the history of the Assimilative Crimes Act disclosed a purpose "to cover crimes on which Congress had not legislated and did not suggest that the Act was to enlarge or otherwise amend definitions of crimes already contained in the Federal Code." 327 U.S. at 723. Thus, there is no question but that federal policy will override any contrary state policy and preclude assimilation of any state statute embodying such contrary state

policy.[14] Usurpation of control by the states over policies to govern in federal enclaves is not therefore even theoretically a danger created by the Act.

Moreover, it is now clear, whatever may have been thought at the time of the *Paul* decision, that Congress, in its periodic reenactments of the Act, did not review the new laws of the various states but merely accepted, to the extent that it had not otherwise legislated, state policy as federal policy for federal enclaves, without any scrutiny of the particular state statutes. Congress was not really adopting specific state laws for each area as if it had considered and enacted each state statute for the enclave in which it would apply. It

[14] In *Air Terminal Services, Inc.* v. *Rentzel et al.*, 81 F. Supp. 611 (E.D. Va.), the company operating the Washington National Airport sought to determine whether a regulation of the administrator of civil aeronautics prohibiting maintenance of racial segregation at the airport, which is located entirely within the State of Virginia, was valid under federal Assimilative Crime Act, and sought to enjoin enforcement of the regulation. Virginia statutes, claimed to have been assimilated by the Act, compelled by criminal sanctions separation of the races in places of public assemblage. In denying the injunction and dismissing the complaint, the court wrote:

> The fundamental purpose of the assimilative crimes act was to provide each Federal reservation a criminal code for its local government; it was intended "to use local states to fill in gaps in the Federal Criminal Code". It is not to be allowed to override other "federal policies as expressed by Acts of Congress" or by valid administrative orders. *Johnson* v. *Yellow Cab Co.*, 321 U.S. 383, 389, 64 S. Ct. 622, 626, 88 L.Ed. 814, and one of those "federal policies" has been the avoidance of race distinction in Federal matters. *Hurd* v. *Hodge*, 334 U.S. 24, 34, 68 S. Ct. 847. The regulation of the Administrator, who was authorized by statute, Act June 29, 1940, 54 Stat. 686, to promulgate rules for the Airport, is but an additional declaration and effectuation of that policy, and therefore its issuance is not barred by the assimilative crimes statute.

was always, from 1825 on, adopting one general federal policy for federal enclaves—a policy of conformity of federal law to state law in areas where Congress had not itself legislated. There is no instance of a refusal by Congress to adopt a particular state statute. All were regularly adopted, and there was no selection, individual examination, or specific choice.

It remains true under the present, as under former statutes, that the federal courts, in applying 18 U.S.C. 13, will be applying federal law adopted by Congress in implementation of a federal policy.[15] Thus, when a federal policy is enunciated, the federal policy will control, and this is true regardless of whether the national government speaks before or after the state.[16] Since it

[15] Judicial interpretations of the Assimilative Crimes Act attesting to this fact will be as valid under the present statute as under the older version. For example, state law regarding the sufficiency of an indictment as a pleading under an assimilated statute is not controlling in a federal prosecution because prosecutions under the federal act "are not to enforce the laws of the state, territory, or district, but to enforce the federal law * * *." *McCoy* v. *Pescor*, 145 F. 2d 260, 262. (C.A. 8), certiorari denied, 324 U.S. 868. Moreover, the Act does not incorporate into the federal law the general statute of limitations of a state relating to crimes. *United States* v. *Andem*, 158 Fed. 996 (D. N.J.).

[16] In a Note in 70 Harv. L. Rev. 685, which concludes that the present Assimilative Crimes Act is valid, the writer comments at page 690: "* * * In the earlier acts Congress appears merely to have adopted the existing state statutes without considering or exempting any particular statute. Indeed, the reviser's comment to the 1948 enactment was that the present statute would make unnecessary the 'periodic pro forma amendments' to keep the laws up to date. It might be argued that the prior methods of adoption were preferable, since Congress had the opportunity to examine the state laws to be assimilated. This opportunity, however, is still available. Congress can at any time exclude state laws enacted after 1948 and such exclusion could be made applicable to a defendant already indicted."

is proper for Congress to adopt state laws as federal law for federal enclaves, it would seem as proper and a more effective implementation of its intent for Congress to adopt the state law as it exists at the time the act is committed.

We do not argue that Congress has unlimited power to adopt or follow the laws of the several states,[17] but only that, with respect to the peculiar problem of federal enclaves located within a state, 18 U.S.C. 13 is an appropriate exercise of congressional power implementing a proper federal policy providing for uniform and non-discriminatory application of state laws within such enclaves. There is no constitutional requirement that this federal policy must be implemented by the useless and unsatisfactory formalism of periodic wholesale adoptions of existing state laws.

B. *Other similar statutes, reflecting congressional adoption of state law for a particular federal purpose, have been held constitutional.* The federal policy of contemporaneous conformity underlying the instant statute, that Congress can adopt the current law of the state in a particular aspect, has been applied to encompass future state legislation in many fields where the early *Paul* decision (6 Pet. 141) was not considered to have an inhibiting effect. Most of

[17] It would appear that any challenge to the enforcement as a matter of federal law of a state statute on the grounds that the statute was violative of due process would be resolved under the Fifth, as well as under the Fourteenth, Amendments. See *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 266; Cf. *Nash* v. *Air Terminal Services*, 85 F. Supp. 545, 549 (E.D. Va.). No question as to the validity of the substance of the state statute is now before the Court. Cf. *United States* v. *Howard*, 352 U.S. 212, 217. Of course, one accused of violating an assimilated state statute would have ample opportunity to raise any applicable state or federal defenses at the trial of the case.

the federal statutes which thus adopt the law of the state concern a particular field of activity, rather than, as does the instant statute, a particular area within a state. But the rationale which supports the congressional adoption of state law for a particular field of activity will necessarily support the congressional adoption of state law for a particular area such as a federal enclave, so long as the adoption of that policy is a reasonable one.

In the field of criminal law, the Webb-Kenyon Act of March 1, 1913, 27 U.S.C. 122 (37 Stat. 699), prohibited the shipment or transportation of intoxicating liquors into a state to be used "* * * in violation of any law of such State". West Virginia subsequently enacted a prohibition law. In *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U.S. 311, 326, this Court upheld the constitutionality of the federal act, stating that there was no proscribed delegation of power because the will which causes the prohibitions to be applicable is that of Congress. Mr. Justice Holmes considered the holding in the *Clark* case as "* * * justifying the adoption of state legislation in advance". *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 169 (dissenting opinion). See also the Reed Amendment to the Webb-Kenyon Act (39 Stat. 1058, 1069), held constitutional in *United States* v. *Hill*, 248 U.S. 420.

The Liquor Enforcement Act of 1936, 27 U.S.C. (1946 ed.) 223 (49 Stat. 1928, 1930), prohibited the transportation of liquor into a state unless accompanied "* * * by such permit or permits, license or licenses therefor as are now or *hereafter required by the laws of such State*" (emphasis added). The constitutionality of that Act was upheld in *Hayes* v. *United States*,

112 F. 2d 417 (C.A. 10), but the prospective feature of the statute was not involved.

Another statute which incorporates into federal criminal law the present and future laws of the states is the Fugitive from Justice Act, 18 U.S.C. 1073 (62 Stat. 755). That act makes it criminal for a person to travel in interstate commerce to avoid prosecution for specified crimes as they are defined "under the laws of the place from which he flees". In *Hemans* v. *United States*, 163 F. 2d 228 (C.A. 6), certiorari denied, 332 U.S. 801, it was contended, *inter alia*, that the statute "constitutes delegation of legislative power of the United States to make Federal crimes to the States * * * in violation of the Constitution". The court sustained the constitutionality of the section.

The Federal Black Bass Act, 16 U.S.C. 852 (61 Stat. 517 and 66 Stat. 736) makes it unlawful for any person to transport fish in interstate commerce if the transportation is contrary to the law of the state from which it is transported.[18] Similarly, 18 U.S.C. 43 (62 Stat. 687) makes it criminal to transport in interstate commerce game taken in violation of the laws of the various states and foreign nations as well.

The Johnson Act, 15 U.S.C. 1172 (64 Stat. 1134), relating to the transportation of gambling devices, provides that a state may by law exempt itself from the provisions of the act, thus making the application of an act of Congress dependent upon state action. See *Nilva* v. *United States*, 212 F. 2d 115 (C.A. 8), certiorari denied, 348 U.S. 825.

[18] This Act was recently construed in *United States* v. *Howard*, 352 U.S. 212, where the Court rejected the contention that the rules of an administrative agency should not be considered the law of the state within the meaning of the Act.

The Connally Hot Oil Act, 15 U.S.C. 715, *et seq.* (49 Stat. 30), provides for cooperation between the federal government and the states in the enforcement of a policy for the conservation of natural resources. Criminal sanctions are provided for the violation of its provisions. The applicability of the act is dependent upon the passing of state conservation laws; it has been held not to be a delegation of legislative power by Congress. *Humble Oil and Refining Co.* v. *United States*, 198 F. 2d 753 (C.A. 10), certiorari denied, 344 U.S. 909; *Griswold* v. *The President of the United States*, 82 F. 2d 922, 923 (C.A. 5).

In the civil field, the Federal Tort Claims Act bases the liability of the United States on "the law of the place where the act or omission occurred" 28 U.S.C. 1346(b) (63 Stat. 62). See *e. g. Stewart* v. *United States*, 186 F. 2d 627, 630-631 (C.A. 7), certiorari denied, 341 U.S. 940.[19]

The Bankruptcy Act similarly draws upon state law in numerous respects. Thus, 11 U.S.C. 24 provides that the Bankruptcy Act shall not affect the allowance to bankrupts of exemptions prescribed "* * * by the State laws *in force at the time of the filing of the petition*" (emphasis added). This Court unanimously held this section constitutional in *Hanover National Bank* v. *Moyses*, 186 U.S. 181, 189-190. Without specifically alluding to the fact that the statute, on its face, would apply to both present and future laws, the Court ruled that there was no unlawful delegation of legislative power.

---

[19] Under Rule 43(a) of the Federal Rules of Civil Procedure, "* * * All evidence shall be admitted which is admissible * * * under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. * * *"

Under 50 U.S.C. App. 1894 (i) (1) and (2) (63 Stat. 25), provisions were made for states to remove their areas from federal rent control provisions either by passing rent control legislation of their own or by determining that rent control was unnecessary. This Court summarily upheld the constitutionality of these sections. *United States* v. *Shoreline Cooperative Apartments*, 338 U.S. 897, reversing *Woods* v. *Shoreline Cooperative Apartments*, 84 F. Supp. 660 (N.D. Ill.).[20]

In short, it has been a general assumption with respect to congressional power generally that, for a particular federal purpose, Congress may adopt not only existing, but future, state laws which carry out that purpose. That has been done by the statute here involved.

III

THE ASSIMILATIVE CRIMES ACT DOES NOT INVOLVE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER

For the reasons discussed in Point II, we think it confuses the issue to speak of the Assimilative Crimes Act in terms of concepts of delegation of legislative power developed in relation to acts of administrative agencies. There is not present here, as there is in the field of administrative law, any question as to the extent to which the elected representatives of the people may delegate law-making functions to non-elective bodies. And there is no problem of the separation of powers as between the legislative and executive branches of the govern-

[20] For other civil statutes in which Congress has conditioned federal action on actions or determinations by the states, see *Gauley Mountain Coal Co.* v. *Director of U.S.B. of Mines*, 224 F. 2d 887, 890-891 (C.A. 4), and cases there cited. Cf. *Alaska Steamship Co.* v. *Mullaney*, 180 F. 2d 805, 816-817 (C.A. 9).

ment. This is a problem arising out of, and peculiarly related to, our federal form of government with its dual spheres of sovereignty, and, as already shown, the Act is an exercise of congressional power to implement federal policy with relation to the federal domain. In passing the present Assimilative Crimes Act, Congress did not "delegate" to the state any authority to legislate for the United States as such. It merely adopted and continued as federal policy for federal enclaves the rule of conformity to surrounding areas.

Of course, when the federal government assumes the police power formerly held by a state as an incident of a cession of jurisdiction and Congress then provides for an adjustment between the legislative functions of state and nation within the area of that power by adopting some state law as it has done in the Act, it may be said that the resultant accommodation is a delegation of legislative power because state criminal law is the continuing standard which spells out a federal crime if Congress has not otherwise spoken. But this is not to say that such a "delegation" is unconstitutional.

Article I, § 8, cl. 17, of the Federal Constitution provides:

> The Congress shall have power * * *
>
> * * *
>
> *To exercise exclusive Legislation* in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, *and to exercise like Authority* over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection

> of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; * * *. [Emphasis added.]

This Court has held that the word "exclusive" does not mean "non-delegable". *District of Columbia* v. *Thompson Co.*, 346 U.S. 100, 109, 110 (upholding a criminal conviction under acts of the District of Columbia legislative assembly passed pursuant to the Organic Act of February 21, 1871, 16 Stat. 419). In holding the acts enforceable, the Court based its decision largely on the analogy of delegations of legislative power to the territories, noting at pp. 105-107:

> The power of Congress over the District and its power over the Territories are phrased in very similar language in the Constitution * * *.
>
> * * * The power which Congress constitutionally may delegate to a territory (subject of course to "the right of Congress to review, alter, and revoke," *Hornbuckle* v. *Toombs*, 18 Wall. 648, 655) covers all matters, "which, within the limits of a State, are regulated by the laws of the State only." *Simms* v. *Simms* [175 U.S. 162, 168].
>
> The power of Congress to grant self-government to the District of Columbia under Art. I, § 8, cl. 17 of the Constitution would seem to be as great as its authority to do so in the case of territories. * * *

While the *Thompson* case noted that, so far as the seat of the federal government is concerned, such powers may not be delegated to the surrounding states, different considerations apply to federal enclaves located *within* a state. Thus, this Court has held that the federal government may accept concurrent jurisdiction with the state over federal enclaves within the

meaning of Art. I § 8, cl. 17, so long as that does not operate to deprive the United States of the enjoyment of the property for the purposes for which it was acquired. *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 141-149. See also *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 100-101; *Mason Co.* v. *Tax Commission*, 302 U.S. 186, 207-208. Therefore, it is apparent that it is not mandatory for Congress to "exercise exclusive legislation" over federal enclaves under clause 17. The only purpose of this provision in clause 17 consistent with sound reasoning is to ensure the United States the use of the property for the purpose for which it was acquired. See *Atkinson* v. *State Tax Commission*, 303 U.S. 20; *James* v. *Dravo Contracting Co.*, 302 U.S. 134; *Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U.S. 525. It would seem that Congress has properly effectuated that purpose by providing for the "delegation" involved here.

It is true that the Constitution does not give Congress "exclusive" power over the territories of the United States in the same express words found in clause 17. Art. IV, § 3, cl. 2, provides, "The Congress shall have Power to * * * make all needful Rules and Regulations respecting the Territory * * * belonging to the United States; * * *". However, this Court has construed this clause as granting Congress "exclusive" power. Cf. *United States* v. *California*, 332 U.S. 19; *Utah Power and Light Co.* v. *United States*, 243 U.S. 389; *Sere* v. *Pitot*, 6 Cranch 332, 336. And, as pointed out in the *Thompson* case, Congress *does* delegate legislative power to the territories. Therefore, since it is clear, as to federal areas (*e.g.*, territories) which are wholly outside the area of any state, and which are subject to the "exclusive"

legislative jurisdiction of Congress, that Congress may delegate power to enact police measures to representatives of the people of that area, Congress should be permitted to delegate similar powers, as to federal areas which are wholly within a state, to representatives of the people of that state. Congress could undoubtedly delegate legislative authority in every federal enclave to a body within that enclave, but such a procedure would, in most cases, be impossible or impractical.[21] And Congress should, we submit, be allowed to delegate legislative power, subject to congressional review and revision, to the body most practically suited to exercise that power, namely the legislature of the surrounding state. The Assimilative Crimes Act thus enables the public will of the people most nearly situated in like position to those on the federal enclave to be reflected in the criminal laws operative on the enclave where there is no conflict with any federal policy.

By enacting 18 U.S.C. 13, Congress did not delegate to the state any power to legislate that would affect generally the law of the United States. No special power was given to the state legislature to decide what should be the law for a federal enclave. The section merely provides that, when the state legislature changes the general law for the surrounding state area in the legitimate exercise of its police power, the changes will apply in the federal area as well. The state legislature is primarily legislating for the whole

[21] The federal government owns approximately 9,033 properties in the 48 states. *Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States*, pt. I, p. 123 (1956). It owns more than 87% of the land in the State of Nevada and over 50% of the land in several other states. *Id.* at p. 3.

state and only incidentally affecting the federal area.[22]

The standard of the delegation is clear. Congress has determined that federal enclaves within a state shall not be a refuge from the force and effect of state laws in the field where, under our Constitution, state power is paramount. The congressional standard is the standard of conformity to state law. As Mr. Justice Holmes stated in his dissent in *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 169 (involving the application of state workmen's compensation laws to maritime work):

> * * * I assume that Congress could not delegate to state legislatures the simple power to decide what the law of the United States should be in that district. But when institutions are established for ends within the power of the States and not for any purpose of affecting the law of the United States, I take it to be an admitted power of Congress to provide that the law of the United States shall conform as nearly as may be to what for the time being exists. * * *

---

[22] "Several factors operate to reduce the danger that arbitrary or irresponsible laws may result from a delegation to the states. The laws which are assimilated must, by the terms of the [Act], be applicable in the state, and there is some safety in the fact that the state has made the act applicable to its own residents and citizens. If a state were to enact a law solely for the federal enclave, disguising it as applicable throughout the state, a court should strike down the measure as not being within the terms of the act. Moreover, the federal government's discretion not to prosecute provides a further check." Note, 70 Harv. L. Rev. 685, 690.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

J. Lee Rankin,
Solicitor General.

Warren Olney III,
Assistant Attorney General.

Leonard B. Sand,
Assistant to the Solicitor General.

Beatrice Rosenberg,
Albert M. Christopher,
Attorneys.

AUGUST, 1957

U. S. GOVERNMENT PRINTING OFFICE: 1957—432216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 35

UNITED STATES OF AMERICA, APPELLANT

vs.

GERALD H. SHARPNACK

On Appeal from the United States District Court
for the Western District of Texas
San Antonio Division

Brief for Appellee

JOEL W. WESTBROOK
Attorney for Appellee
713 Nat'l Bank of Commerce Bldg.
San Antonio 5, Texas

CLEMENS PRINTING COMPANY - SAN ANTONIO, TEXAS

INDEX

CITATIONS

Cases:

Constitution and Statutes:

Miscellaneous:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 35

UNITED STATES OF AMERICA, APPELLANT

vs.

GERALD H. SHARPNACK

On Appeal from the United States District Court for the Western District of Texas San Antonio Division

Brief for Appellee

PRELIMINARY STATEMENT

We accept Appellant's "Statement" and other preliminaries, including Appellant's definition of the "Question Presented."

However, for purposes of convenient introduction to our argument, we here summarize the basis for issue.

The indictment in this case was based upon the alleged commission on a federal enclave of acts which would constitute violation of sections 535(b) and 535(c) of the Texas Penal Code, which sections were enacted in 1950. The indictment's operation depended upon the Federal Assimilative Crimes Act of 1948 (18 U.S.C. § 13) which purports to punish federally acts committed on a federal enclave which

would be punishable by the "laws [of the appropriate states] . . . in force at the time of such act[s] . . ."

The Federal District Court dismissed the indictment on the grounds that Congress could not constitutionally adopt prospectively state criminal laws for its federal enclaves.

That is the question.

SUMMARY OF ARGUMENT

I.

As an exclusively legislative function of Congress, this attempted delegation of the power to create federal criminal law is unconstitutional.

Constitutional limitations inhibit the admitted rght of Congress to share its functions. For example, Congress' inherent legislative functions may not be surrendered to another federal agency.

As a converse example of the limitations inherent in our system of dual sovereignty, the states may not delegate their exclusively legislative powers to the federal government.

The defining of federal crimes and the fixing of penalties therefor is clearly a power belonging exclusively to the legislative branch of the federal government.

II.

Beginning with **U.S. vs. Raul,** 31 U.S. 141; 8 L.Ed. 348, 6 Pet. 141, the federal courts and the Congress (until the Federal Assimilative Crimes Act of 1948) considered that the assimilation of state criminal laws to federal enclaves must be limited to state laws in force at the time of the enactment of any federal assimilative crimes act — else such assimilation would be an unconstitutional delegation of Congress' legislative authority.

III.

Valid Congressional action in aid of enforcement of state law, in filling up the details of federal law, in removing obstacles to the operation of state law, or in delegating law-making functions to federal territories, etc. provide no sound constitutional justification for giving the states the authority to enact federal criminal law for federal enclaves.

IV.

Neither possible outmoding of Chief Justice Marshall's alleged "philosophical considerations" in support of his assumed motivation in **U.S. vs. Paul,** 31 U.S. 141; 8 L.Ed. 348; 6 Pet. 141, in maintaining the "principle of national supremacy," nor reasons of Congressional convenience in avoiding "unnecessary periodic pro forma" re-enactments of Assimilative crimes acts, nor the possible good motives of the policy of "conforming" with state laws in federal enclaves justify transgression of basic constitutional principles.

ARGUMENT

I.

As an exclusively legislative function of Congress, this attempted delegation of the power to create federal criminal law is unconstitutional.

We appreciate that there has been judicial recognition that other branches of the federal government, or the state governments, may properly share certain functions with Congress./1

1/ As reflected in certain of the statutes and cases cited by Appellant, discussed in this brief, pp. 8-18.

However, the decisions have imposed limitations on such shared participation.

Congress may not delegate powers which are strictly and exclusively legislative. **Wayman vs. Southard,** 23 U.S. 1, 42; 10 Wheaton 1, 42; 6 L.Ed., 253, 262.

This Court has emphatically invalidated Congressional attempts to surrender to another agency of the federal government inherently legislative functions. **(Panama Refining Co. vs. Ryan,** 293 U.S. 388, **U.S. vs. Schechter,** 295 U.S. 495).

Appropriately and consistently, attempts by state legislatures to confound our system of dual sovereignty by delegating their functions to agencies of the federal government have been judicially forbidden. **Hutchins vs. Mayo** (Fla. Sup. Ct.) 197 So. 495, 133 ALR 394.

The defining of federal crimes and the fixing of penalties therefor is clearly a power belonging exclusively to the legislative branch of the federal government. As stated by Justice Stone, in **Viereck vs. U.S.,** 318 U.S. 236: "One may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute, or by regulations having legislative authority, and then only if punishment is authorized by Congress." — citing cases.

In the case at bar, the attempted delegation is not partial (therefore posing no such problem as whether or not the delegate was given sufficiently definite standards to apply) — but is entire and complete. In this case the state of Texas, not Congress, has created and defined the crime upon which this indictment is grounded; and the state of Texas, not Congress, has fixed the penalty for the federal crime thusly created and defined.

Clearly, therefore, the state of Texas would be exercising for federal enclaves within her borders an exclusively legislative function of the Congress, if constitutional warrant were to be accorded the purported prospective application of the 1948 Federal Assimilative Crimes Act.

II.

In its attempted prospective application, the Federal Assimilative Crimes Act of 1948 is an unconstitutional delegation of Congress' legislative functions.

This Court, it is true, has never directly held that federal assimilation to federal enclaves of future state criminal laws would be unconstitutional. (See Appellant's Br. p. 19, n. 12.) Conversely, neither this Court, nor any inferior federal court, has ever held or suggested that such prospective assimilation would be valid.

However, the judicial and legislative histories of the pre-1948 Federal Assimilative Crimes Acts reflect strongly the opinion of this Court, inferior federal courts, and of the Congress that the prospective assimilation to federal enclaves of state criminal laws would be an unconstitutional delegation of Congress' legislative authority.

U.S. vs. Paul, 31 U.S. 141; 8 L.Ed. 348, 6 Pet. 141, involved the possible application in federal criminal prosecution for acts committed in the federal enclave of West Point, of an 1829 New York criminal statute under the 1825 Federal Assimilative Crimes Act. Chief Justice Marshall, speaking for this Court, held the 1825 act to be "limited to the laws of the several states in force at the time of its enactment."

Now, the 1825 Act did not by its terms limit its application, but provided for the "same punishment as the laws

of the state * * * provide for the like offense when committed within * * * such state."/2

Accordingly, it appears appropriate to interpret Marshall's opinion as reflecting a **constitutional** limitation upon the Act.

The Government apparently accepts this natural interpretation of Marshall's opinion in its statements that he was motivated by "philosophical considerations" (App. Br. 6, 21) related to his concern for maintaining the "principle of national supremacy." (App.Br. 21-22).

Clearly, the federal circuit courts of the Southern District of New York (**U.S. vs. Barney**, Fed .Cas. 14524) and of Montana (**U.S. vs. Barnaby**, 51 F. 20), both of which cited **U.S. vs. Paul**, interpreted Marshall's limitation as constitutional in nature.

The Eighth Circuit in 1906 (**Hollister vs. U.S.**, 145 F. 773) held valid a 1903 Congressional Act conferring jurisdiction on the federal courts of South Dakota to try, inter alia, larceny offenses committed on Indian reservations within the state, adopting the punishment of South Dakota laws. In so doing, the Court, on p. 779, said: "It [the 1903 Act] does not purport to delegate to the state of South Dakota authority at any time in the future to fix, ad libitum, the punishment of federal offenses. This it could not do. Congress seems to have been willing to adopt the punishment as fixed in 1903 by the laws of South Dakota for the crime of larceny, and such adoption was, in our opinion, competent legislation," citing the **Paul**, **Barney** and **Barnaby** cases.

Just as clearly did Congress (prior to the 1948 Act) similarly interpret **U.S. vs. Paul**, as conceded by the Government (App.Br. 11-12) and as reflected by the Federal Assimi-

---

2/ Section 3, 4 Stat. 115.

lative Crimes Acts of 1866, 1898, 1909, 1933, 1935, and 1940, all of which in express language limited their application to state criminal laws in force at the time of each such enactment, or as of a specified date prior to such enactment.

When Congress by its 1948 Federal Assimilative Crimes Act abandoned this interpretation, it apparently did so solely on the basis of convenience, to make "unnecessary periodic pro forma amendments of this section to keep abreast of changes of local laws," (Reviser's Note, 18 USC, following section 13).

Surely, there were in 1948 — nor since then — no federal judicial holdings which discarded the constitutional interpretation of **U.S. vs. Paul.**

Probably the latest expression by this Court, prior to 1948, dealing with the question of the prospective application of state laws to federal enclaves was in **Pacific Coast Dairy, Inc. vs. Dept. of Agriculture of Calif., et al,** 318 U.S. 285; rehearing denied 318 U.S. 801, decided in 1943, with Mr. Justice Roberts speaking for the majority (6-2). In this case this Court considered the question of the applicability of a California regulatory law to a milk distributor doing business with the War Department on the federal enclave of Moffett Field. This Court observed (on p. 294 of 318 U.S.) that "the state statute involved was adopted long after the transfer of sovereignty and was without force in the enclave."

Franklin vs. U.S., 216 U.S. 559, reflects the same concept. This Court then almost summarily rejected the contention that the Assimilative Crimes Act of July 7, 1898, which expressly limited its application to state laws then in force, was an unconstitutional delegation of Congress' legislative function. In so doing this Court most significantly remarked, after stating the limitation of state

laws to the date of the 1898 act: "There is, plainly, no delegation to the states of authority in any way to change the criminal law applicable to places over which the United States has jurisdiction."

This Court, in the **Franklin** case, obviously was recognizing the proposition that prospective application in federal enclaves of state criminal laws would be a delegation of Congress' legislative functions.

III.

Valid Congressional action in aid of enforcement of state law, in filling up the details of federal law, in removing obstacles to the operation of state law, or in delegating law-making functions to federal territories, etc. provide no sound constitutional justification for giving the states the authority to enact federal criminal law for federal enclaves.

A. Appellant urges that statutes similar to the Federal Assimilative Crimes Act of 1948, "reflecting Congressional adoption of state law for a particular federal purpose have been held constitutional." (App.Br. 26-30).

(1.) None of the statutes cited by Appellant in support of this proposition involve the adoption of state laws for federal enclaves. We believe this distinction to be real, because the power of Congress to legislate for federal enclaves has its own separate constitutional warrant, i.e. Article I, Section 8, Clause 17 of the Federal Constitution, which confers upon Congress "exclusive Legislation" over federal enclaves; and the judicial history of the interaction of federal and state powers with respect to such enclaves has been significantly different from the judicial history of federal-state power relations in the exercise of Congress' com-

merce power, power to enact bankruptcy laws, its war-making power, and the like./3

(2) We believe that, additionally, a single, overriding distinction eliminates authoritative significance from appellant's citations of federal statutes in "the field of criminal law", together with the cases cited thereunder. In all such statutes, where criminal sanctions have been imposed, the basic definition of the crime and the fixing of punishment therefor has been accomplished by Congress, not the states. In other words, the legislative function of defining crime and fixing the punishment therefor has been performed by Congress, not the states.

Indeed, **Clark Distilling Co. vs. Western Maryland Ry. Co.**, 242 U.S. 311, cited by appellant (App.Br. 27) most significantly illustrates the constitutional distinction we are here asserting, where on page 326 this Court, in rejecting the contention that the Webb-Kenyon Act of March 1, 1913, 27 USC 122 (37 Stat. 699), was an unconstitutional delegation of power to the states, said that "the will which causes the prohibition to be applicable is that of Congress * * *." The 10th Circuit, in **Hayes vs. U.S.**, 112 Fed. 2d 417, construing the operation of the Liquor Enforcement Act of 1936, 27 USC (1946 ed.) 223 (49 Stat. 1928-30), similarly rejected the contention that Congress was unconstitutionally imposing penalties for violating state laws, saying on page 422 that the penalties were for the violation of the Liquor Enforcement Act.

Obviously, in the case at bar, the trial and conviction of Appellee in a federal court for acts defined as

---

3/ The judicial history of the application of state laws in federal enclaves is discussed in our brief, pp. 5-6, supra.

offenses by Sections 535(b) and 535(c) of the Texas State Penal Code, and the assessment of punishment under these Texas statutes, enacted two years after the Federal Assimilative Crimes Act of 1948, involve the operation of the will of the state of Texas, and not "the will of Congress." The legislative functions of defining crime and assessing the punishment therefor would clearly be exercised by the state of Texas and not by Congress.

(3) Aside from this general consideration, which we believe renders inapplicable to the case at bar appellant's citations of other federal statutes of a criminal nature, there are additional clear-cut bases for distinction.

This Court itself, in the **Clark** case, supra, emphasized the limited application of its decision. On page 331 of 242 U.S., in dealing with the suggestion that its decision would create the possibility of a dangerous extension of the interstate commerce power in allowing the Webb-Kenyon Act's application of state prohibitions, this Court said:

> "* * * The exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace."

We consider significant the different judicial treatment given federal statutes in aid of the enforcement of state laws from that given acts assimilating state criminal laws.

The Fugitive from Justice Act, 18 USC 1073 (62 Stat. 755), clearly was in aid of enforcement of state laws.

Hemans vs. U.S., 163, F.2, 228 (C.A. 6) cert.den., 332 U.S. 801 (App.Br. 28).

The Connally Hot Oil Act, 15 USC 715 et seq. (49 Stat. 30) (App.Br. 29), similarly has been construed as a federal statute in aid of state laws. **Humble Oil Refining Co. vs. U.S.**, 198 F.2, 753 (C.A. 10), cert.den., 344 U.S. 909; **Griswold vs. the President of the U.S.**, 82 F.2, 922 (C.A. 5).

Although we cannot say that this Court, or others, have directly so held, we believe it logical to consider that, in large part at least, the Webb-Kenyon Act and the Reed Amendment thereto, the Liquor Enforcement Act of 1936, the Federal Black Bass Act, 16 USC 852, (61 Stat. 517 and 66 Stat. 736),/4 and the Johnson Act, 15 USC 1172 (64 Stat. 1134)/4 should likewise be considered federal statutes in aid of state laws.

This Court stated, on page 324 of 242 U.S., in the **Clark** case, supra, that the purpose of the Webb-Kenyon Act was

> "to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws * * *" /5

4/ Appellant's Brief, p. 28.

5/ It might be appropriate to note **US vs. Constantine,** 296 US 287, which held a penalty provision of the Revenue Act of 1926, purportedly a tax on certain businesses operated contrary to state laws as being a penalty, and a penalty which could be sustained only through the 18th Amendment (then repealed), and therefore a penalty for violation of state laws beyond Congressional power to impose. We think it clear that the invalidity of this provision of the Revenue Act of 1926 rested upon the proposition that Congress could not impose a penalty for violation of state laws in a field where it had otherwise no constitutional authority to act. This situation differs from the cases construing the Webb-Kenyon Act, and other federal criminal statutes cited by appellant, in that Congress independently in such cases had the power to act with reference to the subject matters there covered, whether by virtue of the 18th Amendment or by virtue of the interstate commerce laws. This distinction was recognized by the Fifth Circuit in the **Griswold** case, supra, when on page 923 of 82 F. 2d, the Court remarked that the federal statute involved, though in aid of state purposes, dealt only with interstate commerce:

(4) Leaving the criminal field, appellant cites three federal civil statutes as representing constitutional adoption of state laws, viz.: the Federal Torts Claims Act, 28 USC 1346(b), (63 Stat. 62), the Bankruptcy Act's provisions respecting exemptions under state law, 11 USC 24 (30 Stat. 548) and federal provisions for removal of federal rent control through state action, 50 USC, App. 1894 (i) (1) and (2), (63 Stat. 25).

The purposes of the Federal Torts Claims Act were to waive (partially) the sovereign immunity of the United States from liability for its torts and, in so doing, to provide for the determination of such liability in accordance with the laws of the place where the alleged tortious act or omission occurred. **Stewart vs. U.S.,** 186 F.2, 627 (C.A. 7), cert.den., 341 U.S. 940 (App.Br. 29).

The federal courts necessarily became the trial forums for lawsuits sounding in tort against the United States, whose liability within the scope of the waiver of immunity of the Federal Torts Claims Act became that of a private person.

We simply fail to see that this Act constitutes an adoption into federal law of state laws, being rather the enforcement of state laws in federal courts, as would be the case in suits between private persons in diversity jurisdiction situations, under the decision of **Erie R. Co. vs. Thompkins,** 304 U.S. 64.

At most we believe that the Federal Torts Claims Act, as well as the Bankruptcy Act and the Housing and Rent Control Act of 1947, are included in the category of federal legislation the application of which — in part at least — is contingent upon certain conditions, such as the status of state law./6

6/ Logically we believe it could be said that this characteristic may attach also to the federal statutes of a criminal nature cited by Appellant.

Cooley's **Treatise on the Constitutional Limitations** (7th Ed.) is instructive in discussing how conditional legislation does not necessarily constitute an unconstitutional delegation of legislative power. On page 163 the author sets out the "settled maxim" that the lawmaking power of the legislature cannot be delegated. Following his discussion of this maxim, he states on pages 163 and 164:

> "But it is not always essential that a legislative act should be a completed statute which must in any event take effect as law, at the time it leaves the hands of the legislative department. A statute may be conditional, and its taking effect may be made to depend upon some subsequent event. * * *."

In rejecting the contention that the Bankruptcy Act's provisions allowing exemptions under state law constituted unconstitutional delegation of Congressional power, this Court has characterized these provisions as "**recognition** of local laws." (Emphasis supplied.) **Hanover Natl. Bank vs. Moyses,** 186 U.S. 181, 190. (App.Br. 29).

Logically we should treat, not as adoption of state laws, but as the use of state laws as conditions regulating the application of federal law, the 1947 Housing and Rent Control Act's provisions for removing federal rent control where state rent control laws were enacted, or where there was state determination that rent control was unnecessary. **United States vs. Shoreline Coop. Apts.,** 338 U. S. 897, a memorandum decision upholding the constitutionality of these provisions was based upon the holding in **Woods vs. Miller**, 333 U.S. 138. This earlier case held to be constitutional provisions for removal of federal rent controls upon findings of the housing

administrator. Accordingly, we believe it logical to consider that this Court in the **Shoreline** case treating the existence of state rent control laws, or state determinations of lack of necessity for rent controls, as being similar to the existence of conditions found by the housing administrator to warrant removal of federal rent controls.

We believe it reasonable to say that the federal statutes cited by Appellant, in any prospective application they might have, would not be adopting state laws as federal laws, but simply conditioning the application, force and effect of the federal laws upon the state laws.

This clearly is not the case with the attempted prospective effect of the Federal Assimilative Crimes Act of 1948. It does not condition its application upon state laws — there is nothing to apply, except the state laws themselves. The 1948 Act attempts to adopt prospectively the state criminal laws for federal enclaves — a concept significantly different in a constitutional sense.

(5) This significantly different constitutional concept gives rise to a final basis for distinguishing the statutes and cases cited by Appellant as reflecting instances of constitutional adoption by Congress of state laws.

In only one of the cases cited by Appellant was the possible prospective feature of the appropriate statute directly in issue. **Clark Distilling Co. vs. Western Md. Ry. Co.**, 242 U.S. 311, may reasonably be presented as an exception, albeit distinguishable on other grounds (q.v., our discussion, this brief, pp. 9-10, supra).

Justice Holmes, in his dissent in **Knickerbocker Ice Co. vs. Stewart,** 253 U.S. 149, 169, did say, "I thought that

Clark Distilling Co. vs. Western Maryland Ry. Co. * * * went pretty far in justifying the adoption of state legislation in advance." Continuing, however, he said,

> "But I can see no constitutional objection to such an adoption in this case * * * **I assume that Congress could not delegate to state legislatures the simple power to decide what the laws of the United States should be in that district.** But when institutions are established for ends within the power of the states and not for any purpose of affecting the law of the United States, I take it to be an admitted power of Congress to provide that the law of the United States shall conform as nearly as may be to what for the time being exists." (cf. App. Br., 27). (Emphasis supplied).

Knickerbocker's majority opinion raises serious doubt, to say the least, that Mr. Justice Holmes' interpretation of the **Clark** case in this regard represents the established view of this Court.

This Court in **Knickerbocker** held invalid a Congressional attempt to adopt state workmen compensation laws covering maritime workers, using strong language in disapproval of delegation of Congress' legislative power to the states:

> "The subject [admiralty and maritime jurisdiction, for which read 'exclusive Legislation' over federal enclaves] was entrusted to it [Congress] to be dealt with according to its discretion — not for delegation to others. * * * Congress cannot transfer its legislative power to the states — by nature this is non-delegable. * * *" (p. 164 of 253 US).

We have already discussed **Pacific Coast Dairy, Inc. vs. Dept. of Agriculture of Calif., et al**, 318 U.S. 285, rehearing denied, 318 U.S. 801. (This brief, page 7). This

Court's holding in that case can fairly be said, we believe, to have considerable advantage over the **Clark** case as authority in the case at bar because: 1) it dealt specifically with the question of "prospective"/7 operation of state law; 2) it involved the "prospective"/7 application of state law to a federal enclave; 3) it is of course a much later expression of this Court.

B. Appellant proposes that Congress should be permitted to delegate the power to the states to enact criminal legislation for federal enclaves, because Congress may delegate such powers to territorial legislatures and the legislative assembly of the District of Columbia, and presumably to legislatures created for such enclaves. (App.Br. 33-34).

Appellant's proposition simply ignores the dual sovereignty concept of our constitutional system.

Our Federal Constitution divides power between the Federal government and the states. No such constitutional division of powers exists between the Federal government and the territories, District of Columbia and federal enclaves. The Constitution confers no powers upon them; necessarily federal power exercised therein must be conferred by the Congress.

We analyze Appellant's effort to escape the clear implications of our dual sovereignty concept as embracing two principal theories.

7/ We place "prospective" in quotes because we consider this to be a logical interpretation of this Court's holding. This Court, in the **Pacific** case, supra, recognized the applicability to federal enclaves of local law in existence at the time of cession of the enclave, but denied the applicability of state laws enacted subsequent to cession.

> The first of these postulates the impracticability of delegating legislative authority to some body within each federal enclave, and urges that the presumed necessity of delegation suggests the legislature of the surrounding state as the body most practically suited to exercise the power (App.Br. 34). The role of convenience or practicality is not in our understanding a determinative basis for interpreting our Federal Constitution./8

Secondly, Appellant tells us that the 1948 Federal Assimilative Crimes Act does not give any "* * * special power * * * to the state legislature to decide what shall be the law for a federal enclave," merely providing that changes in state law shall "apply in the federal area as well." (App.Br. 34). Indeed, Appellant recognizes that Mr. Justice Holmes, despite his feeling that **Clark Distilling Co. vs. Western Md. Ry. Co.**, 242 U.S. 311, had gone "pretty far in justifying the adoption of state legislation in advance," assumed "that Congress could not delegate to state legislatures the simple power to decide what the law of the United States should be in that district." **Knickerbocker Ice Co. vs. Stewart**, 253 U.S. 149, 169.

We consider that Appellant is saying in effect: the state of Texas cannot enact criminal laws that apply only to federal enclaves, but Texas criminal laws of general application enacted subsequent to the 1948 Federal Assimilative Crimes Act constitutionally are enforceable in the federal courts as a matter of conformity.

We simply inquire, what is the constitutional difference? Appellant's distinction could become a constitutional dif-

---

8/ The practicality problem is further discussed in this brief, Part IV, page 19, et seq., infra.

ference only if federal courts constitutionally could try violations of state criminal laws as such. This proposition of course is constitutionally untenable.

In the case at bar, the United States is party plaintiff, is prosecutor, just as much as in cases of violation of criminal laws Congress has specifically denounced.

The power to convict and punish being here asserted would, if constitutionally allowable, be federal power. Only the federal legislature can constitutionally exercise it.

Finally, is the "conformity" sought by Appellant in the prospective features of the 1948 Federal Assimilative Crimes Act the "conformity" permitted in such cases as **James vs. Dravo Contracting Co.**, 302 U. S. 134, 141-149; **Stewart & Co. vs. Sadrakula,** 309 U.S. 94; **Mason Co. vs. Tax Commission,** 302 U.S. 186? (App.Br., p. 33) Clearly not. **James vs. Dravo** held that cession to the United States need not require complete cession of state jurisdiction (pp. 141-142 of 302 U.S.). No such question here exists. The **Mason County** case determined that the United States had not acquired "exclusive jurisdiction" over the land involved (pp. 203-210 of 302 U.S.), likewise a question not existing in the case at bar. In **Stewart vs. Sadrakula,** while this Court recognized that local laws respecting private rights in existence at the time of cession of a federal enclave continue in force, in the absence of conflicting Congressional action (pp. 99-100 of 309 U.S.), this Court stated that statutes enacted after cession "are not a part of the body of laws in the ceded area. Congressional action is necessary to keep it current." (p. 100 of 309 U.S.). And **Pacific Coast Dairy, Inc. vs. Dept. of Agriculture of Calif., et al.,** 318 U. S. 285 (discussed in this brief, pp. 7, 15-16, supra) has directly and recently confirmed this limitation on the operation of state laws enacted subsequent to cession.

IV.

Neither possible outmoding of Chief Justice Marshall's alleged "philosophical considerations" in support of his assumed motivation in U.S. vs. Paul, 31 U.S. 141; 8 L.Ed. 348; 6 Pet. 141, in maintaining the "principle of national supremacy," nor reasons of Congressional convenience in avoiding "unnecessary periodic pro forma" re-enactment of assimilative crimes acts, nor the possible good motives of the policy of "conforming" with state laws in federal enclaves, justify transgression of basic constitutional principles.

Appellant depreciates the value of Chief Justice Marshall's opinion in **U.S. vs. Paul,** supra, on the basis of his "philosophical considerations" in support of the "principle of national supremacy," because, as Appellant puts it, with "the power of the federal government * * * [being] * * * firmly established," "Marshall's 'exclusive' idea no longer prevails." (App.Br. 21-22).

Appellant cited Corwin, **The Constitution of the United States of America, Analysis, Interpretation with Annotations (1953),** page xxvi Sen. Doc. No. 170, 82d Cong., 2d Sess. On page xxviii of his "Introduction" Corwin appears to disagree with Appellant's conclusion that the "principle of national supremacy" no longer supplies valid energy to constitutional interpretations, saying:

> "The purpose of it [the Supreme Court] serves more and more exclusively the purpose for which it was originally created to serve, the maintenance of the principle of National Supremacy."

We are not aware that this Court has ever overturned a prior decision on this basis.

Appellant's position in this respect actually seems related to Appellant's overall contention, in default of directly sup-

porting authority, that Congress' attempt at prospective adoption for federal enclaves of state criminal laws should be validated on the basis of convenience.

This "convenience" basis finds its earlier expression in the very publication of the 1948 Federal Assimilative Crimes Act in United States Code Annotated, following Section 13, Title 18, in the Reviser's Note, stating that the prospective features of the Act had the purpose of avoiding "unnecessary periodic pro-forma re-enactments" of assimilative crimes acts.

There appears to be no expression of this justification other than those found in Appellant's brief and in 70 H.L.R., beginning at p. 685. The Note in the February 1957 issue of the Harvard Law Review seems not to be occasioned by any recent case, and indeed in our view contains little not expressed in Appellant's brief. The Note, as quoted in Appellant's brief (p. 35, n.22) does suggest that the "danger that arbitrary or irresponsible laws may result from a delegation to the states" is lessened by the "federal government's discretion not to prosecute. * * *" 70 HLR 685, 690.

We speculate that the note's author is here referring to the U.S. Attorney's practical discretion not to submit a possible criminal offense to a Federal Grand Jury, to his influence in persuading a Grand Jury not to indict, to his discretion in not filing an information, or in filing a motion to dismiss an indictment.

We hope it may not be considered facetious to remark that it does seem appropriate, although not legally persuasive, to justify in part the attempted giving to the states of complete discretion in creating criminal laws for federal enclaves by the assumed balance of the prosecutor's discretion in not enforcing these assertedly valid enactments.

In the first and last analysis we believe it fair to say that Appellant's case rests upon the proposition that the policy of conformity is well motivated and convenient.

Possibly so.

However, this Court has frequently, and fairly recently, held that neither good motives nor convenience represented any acceptable substitute for constitutionality.

In **Youngstown Sheet & Tube Co. vs. Sawyer,** 343 U.S. 579, the Government invoked the existence of a "grave emergency" as justifying the President's order for seizure of steel mills under the President's alleged constitutional powers as Chief Executive and as Commander-in-Chief of the Armed Forces (p. 582 of 343 U.S.). Mr. Justice Black, in delivering the opinion of this Court, denying the presidential power asserted, did not dispute the Government's claim of "grave emergency," but said (on page 589 of 343 U.S.): "The founders of this nation entrusted the law making power to the Congress alone in both good and bad times."

Mr. Justice Jackson, concurring, remarked on the hazard of "confusing the issue of a power's validity with the cause it is invoked to promote * * * The tendency is strong to emphasize transient results upon policies — such as wages or stabilization — and lose sight of enduring consequences upon the balanced power structure of our Republic." (p. 634 of 343 U.S.).

Mr. Justice Clark denied the President's power to act in the emergency because Congress had prescribed the methods for meeting the emergency. (p. 662 of 343 U.S.).

Mr. Justice Douglas began his concurring opinion:

"There can be no doubt that the emergency which

> caused the President to seize these steel plants was one that bore heavily on the country. But the emergency did not create power; it merely marked an occasion when power should be exercised. And the fact that it was necessary that measures be taken to keep steel in production does not mean that the President, rather than the Congress, had the constitutional authority to act." (p. 620 of 343 U.S.)

After bespeaking recognition of the greater efficiency and practicality with which the Executive can act, Justice Douglas stated:

> "We therefore cannot decide this case by determining which branch of government can deal most expeditiously with the present crisis. The answer must depend on the allocation of powers under the Constitution," (p. 630 of 343 U.S.), and "We pay a price for our system of checks and balances * * *" (p. 633 of 343 U.S.).

This last statement of Justice Douglas received emphasis from Mr. Justice Frankfurter in his concurring opinion:

> "Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded — too easy." (p. 593 of 343 U.S.).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

JOEL W. WESTBROOK,
Attorney for Appellee.

September, 1957.